

No. 14334

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United States  
Court of Appeals  
for the Ninth Circuit

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CHARLES B. SMITH, as Special Administrator  
of the Estate of Edward S. Birn, Deceased,  
Appellant,

vs.

MILTON SPERLING, HARRY M. WARNER,  
JACK L. WARNER, UNITED STATES  
PICTURES, INC., and WARNER BROS.  
PICTURES, INC., Appellees.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 293 to 595, inclusive)

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Appeal from the United States District Court for the Southern  
District of California, Central Division

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PAUL P. O'BRIEN,  
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DEPOSITION OF ROBERT W. PERKINS

Plaintiff's Exhibit No. 119: Deposition of Robert W. Perkins, a witness called by and in behalf of the defendants, taken pursuant to stipulation dated May 2, 1951, at 321 West 44th Street, New York, N. Y., on the 21st day of May, 1951, before Murray Padgug, a Notary Public of the State of New York. [784-150]

\* \* \* \* \*

Direct Examination

Q. (By Mr. Williams): What is your occupation, Mr. Perkins?           A. I am a lawyer.

Q. Are you connected with Warner Bros. Pictures, Inc.?

A. Yes, sir. I'm general counsel for that company.

Q. And how long have you been general counsel for [784-151] the company?

A. Since 1936.

Q. Do you devote yourself in your professional work exclusively to the business of Warner Bros. Pictures, Inc., and its subsidiary and affiliated corporations?           A. That is correct.

Q. Do you represent any one of the brothers Warner individually?           A. No.

Q. Are you also a director of Warner Bros. Pictures, Inc.?           A. Yes, sir.

Q. And you have been for how long a time?

A. I think the same length of time that I have been general counsel.

Q. Do you make it a practice to attend all of

(Deposition of Robert W. Perkins.)

the meetings of the Board of Directors, unless you happen to be out of town?      A. I do.

Q. I call your attention to the minutes of a meeting of the Board of Directors of Warner Bros., held on the 25th day of September, 1945, simply for the purpose of directing your attention to that date, and I will say that those minutes indicate that on that date there was submitted to the Board and accepted by the Board the resignation of [784-152] Joseph Bernhard as vice-president and director of Warner Bros., and I may say when I use the expression "Warner Bros.", unless the context shows that I mean otherwise, I mean Warner Bros. Pictures, Inc. You were present at that meeting, were you not?      A. Yes, sir.

Q. Having refreshed your recollection, do you remember that the resignation of Mr. Bernhard was accepted at that time?      A. Yes, sir.

Q. At the time of the presentation of his resignation, was there anything said or any conversation had by any persons at that Board meeting as to why he was resigning?

A. He was resigning to go into production.

Q. Was there any more detail than that mentioned at that meeting?

A. Why, my recollection is that it was stated that Mr. Bernhard was going into partnership with Mr. Milton Sperling in the production of motion pictures, and that it was contemplated that those pictures would be distributed by Warner Bros. Pictures.

(Deposition of Robert W. Perkins.)

Q. Was anything said at that time as to who Mr. Sperling was?      A. Yes.

Q. What was stated in that regard? [784-153]

A. That he was the son-in-law of Mr. Harry Warner.

Q. Was anything said as to what his experience had been?      A. I think so.

Q. Do you remember in substance what was said on that subject?

A. Well, that he had been in the motion picture business for quite a while and had been a writer and a producer for 20th Century-Fox.

Q. I call your attention next to a meeting of the directors held three days later, on the 28th of September, 1945, at which time there was submitted to the Board a proposed contract between Warner Bros. and United States Pictures, Inc. I ask you to examine the minutes, refresh your recollection thereby, and then I will ask you some questions about.

A. (Reading) Yes, sir.

Q. You were present at that meeting?

A. Yes, sir.

Q. Do you remember that at that meeting a resolution was adopted authorizing the execution of the contract that I have just described?

A. Yes, sir.

Q. Do you remember what if anything was said of and concerning that contract, its terms and provisions and by [784-154] whom, prior to the action of the Board?

(Deposition of Robert W. Perkins.)

A. Well, I remember that the contract was discussed at some length. I am quite sure Albert Warner was presiding, and my recollection is that he brought up the matter, and Mr. Friedman had with him a copy of the contract, and that after perhaps introduction of the matter by Major Warner, that Mr. Friedman analyzed the contract for the benefit of the Board members.

Q. Do you remember now any of the details of that contract?

A. No, except that it was a contract of what I suppose should be described as the general type under which an independent producer—in this case, United States Pictures, Inc.—would make a picture and turn the picture after completion over to the company for distribution on a percentage basis. I remember that the pictures were to be made on the Warner lot, and I think the pictures were to be financed in part by United States Pictures and in part by Warner Bros. Pictures. There was a percentage for distribution, and after the recoupment of the cost from the remaining proceeds of the picture, then, still deducting the percentage, the remaining proceeds were to be split between United States Pictures and Warner Bros. Pictures.

Q. Do you remember the percentage of the split? [784-155]

A. It was fifty-fifty.

Q. Do you remember that that contract was in some detail explained by Mr. Friedman?

A. I'm sure it was.



(Deposition of Robert W. Perkins.)

Q. Do you remember having noted any particular provision or provisions that at the time struck you as being unfavorable or unsatisfactory from the standpoint of the company?

A. No, sir.

Q. Subsequent to the explanation of that contract and at the time the Board approved it, did you vote favorably on the approval of the contract?

A. Yes, sir.

Q. Had you also voted favorably on the resignation of Mr. Bernhard at the meeting before that?

A. Yes, sir.

Q. Was your vote in either of these instances suggested or directed by any person other than yourself?      A. No.

Q. Did you exercise your own independent judgment in voting on both of these occasions?

A. Yes.

Q. I direct your attention now to a meeting which was held on the 23rd of November, 1945, and in order to refresh your recollection as to that meeting, at which the [784-156] minutes show you were present, I will call your attention to the fact that at that meeting there was submitted an amendment to the basic agreement referred to at the last meeting, which provided in effect that from the proceeds of the distribution of any pictures made under the terms of that basic agreement, that Warner Bros. should retain and turn over to the bank which was making a loan to United States

(Deposition of Robert W. Perkins.)

Pictures such sum as was necessary to pay that loan or loans.

Do you remember the circumstances of that meeting?

A. I remember that there was a meeting some time after this meeting in December.

Q. I will show you the minutes.

A. —which had to do with—excuse me—some problem with the arrangement with the bank.

Q. Do you now remember having examined the minutes as to just about what that particular problem was?

A. Frankly, no, Mr. Williams. I remember that I did not consider that it was a very important change.

Q. You voted in favor of it? A. I did.

Q. Did anybody direct or suggest the manner in which your vote should be cast on that?

A. No.

Q. Your vote was the result of your own independent [784-157] thought, in view of your then knowledge of what was proposed by the amendment? A. That's correct.

Q. And you do not now remember the details of that particular amendment?

A. No, sir.

Q. I direct your attention to a meeting of the directors held on the 18th of June, 1946, which had to do with an amendment to the contract with reference to a single motion picture to be produced under the contract, which picture was entitled

(Deposition of Robert W. Perkins.)

Pursued, and in order to refresh your recollection of the matter, I direct your attention to the fact that picture involved a third corporation, Hemisphere Pictures, which was a corporation in which there were the author of the screen play, Niven Busch, and the proposed star of the picture, Teresa Wright, who were to be stockholders, and under the terms of which Warner Bros. would receive only one-third of the net proceeds, and the other proceeds would be divided between the Hemisphere Pictures and United States Pictures, but Warner Bros. would receive a higher percentage for distribution; that is, instead of getting twenty per cent domestic, it would be twenty-five per cent domestic, and more for foreign, and also that Warner Bros. would receive a higher rate of overhead [784-158] on its facilities.

Do you remember that meeting? I will show you the minutes or a copy of the minutes so that you may refresh yourself as to the date and as to who was present and as to what was done there.

A. Yes, sir. I remember that there was a meeting which acted on the matter of amending the contract with United States Pictures so as to provide for a picture in which a company called Hemisphere Pictures or some such name was to produce or to participate in the production.

Q. Do you remember what reasons, if any, were stated as to why Warners should reduce its participation in the net profits from one-half to one-third in that particular case?

(Deposition of Robert W. Perkins.)

A. In general, yes. The—It was felt that the picture which was to be produced would be a valuable one, because of Busch, the writer, and Wright, the star. United States Pictures and Warner Bros. Pictures could not get the picture except on terms under which Hemisphere would produce the picture or participate in the production and would share in the profits; and the amendment which was laid before the meeting was the result of the negotiations with Hemisphere to that end; and my understanding is that the sharing arrangement, both of Warner Bros. Pictures, Inc. [784-159] and of United States Pictures, was reduced in order to meet the demand of Hemisphere, that that company also should participate.

Q. You voted in favor of that amendment, did you not?      A. Yes, sir.

Q. Did any person suggest or direct how you should vote?      A. No.

Q. Was your vote the result of your own independent judgment?      A. Yes.

Q. And in your opinion was it for the benefit of Warner Bros. that you should have voted as you did on that and on the previous occasions?

A. Yes.

Q. I direct your attention to a letter-contract dated December 6, 1947, which was executed on behalf of Warner Bros. by R. J. Obringer, and which did not come before the Board for approval or action at that time; in fact, was not brought to the attention of the Board officially until 1950.



(Deposition of Robert W. Perkins.)

I ask you to examine the photostatic copy I have of this contract and, having examined it, I will then ask you some questions.

A. (Reading) All right. [784-160]

Q. I call your attention to the fact that by the terms of that contract provision is made for the selection by United States Pictures of four pictures, which are designated in the contract as "additional pictures," and as to those additional pictures Warner Bros. are to advance the entire cost of production; that the distribution fee is to be raised from twenty per cent domestic to twenty-five per cent, and from twenty-five per cent British to thirty per cent, and various percentages for other foreign distribution; that the provision is made that a higher rate of overhead is to be charged for Warner's facilities to be used in the making of the pictures, and that the net profit from the distribution of the picture, after recoupment of all costs and distribution charges is to be divided eighty per cent to Warner Bros. and twenty per cent to United States Pictures.

Having that in mind, do you remember the circumstances of that amendment being brought to the attention of the Board?

A. No, I don't, Mr. Williams.

Q. Were you present at that meeting——

Mr. Pottish: Might I say at this point——

Mr. Williams: Just a minute. You are right. There wasn't any meeting, I withdraw that last question.

(Deposition of Robert W. Perkins.)

Q. You do not remember it being brought to the [784-161] attention of the Board?

A. Well——

Q. Pardon me. Were you aware of the fact——

A. Excuse me. You asked me about it being brought to the attention of the Board, the circumstances under which it was brought to the attention of the Board. That I don't remember. It is my recollection that it was brought to the attention of the Board at some time.

Q. Yes. I will ask you this: whether at or about December 6, 1947, it came to your knowledge that such a contract had been executed by Mr. Obringer on behalf of the corporation.

A. I do not recollect when, but it did come to my knowledge.

Q. Do you remember whether or not prior to any meeting of the Board in reference to it, it did come to your attention?

A. In all probability, yes.

Q. You do not remember specifically as to when it did come to your attention?      A. No.

Q. I direct your attention to a meeting of the Board of Directors that was held on the 17th of August, 1950, at which a resolution was adopted, which appears on the last page of the minutes, and I ask you to examine [784-162] the minutes and particularly that last page, and thereby refresh your recollection as to that matter.

A. Yes, sir.

Q. Having refreshed your recollection by exam-

(Deposition of Robert W. Perkins.)

ining the minutes of that meeting, will you state as to whether you were present at the meeting.

A. I was present.

Q. Do you remember the circumstances of this second amendment, with reference to three more additional pictures having been brought before the Board?

A. That's the one dated July 21, 1950, if I remember correctly?

Q. Yes.

A. Yes. I remember that the Board was told that it was proposed to amend the United States Pictures agreement further by providing for additional pictures and for the extension of time for delivery.

Q. Do you remember that it was also pointed out that as to these additional pictures, Warner Bros. would finance the making of each of the pictures, and that it would receive a domestic distribution rate of twenty-five per cent, and British and other foreign of thirty per cent, and various other rates, and that after recoupment of the distribution charge and the entire cost to Warner Bros., that the profits would be divided *eight* per cent to Warner Bros. [784-163] and twenty per cent to United States Pictures?

A. That's my recollection.

Q. Do you also remember that it provided for a rate of overhead as to Warner's facilities that was higher than that provided by the basic agreement?

A. That is my recollection.

(Deposition of Robert W. Perkins.)

Q. You understood that at the time you voted on the amendment?      A. Yes, sir.

Q. Did anybody suggest or direct how you should vote on that matter?      A. No.

Q. Was your vote the result of your own independent judgment?      A. Yes.

Q. You regarded the amendment to the contract as being for the benefit of Warner Bros.?

A. Yes.

Q. You voted in favor of that amendment, then, I take it?      A. Yes.

Mr. Williams: I have no further questions.

\* \* \* \* \* [784-164]

#### Cross Examination

Q. (By Mr. Pottish): Mr. Perkins, is it your understanding that the three Warner brothers could, if they wished, caused a termination of your position as general counsel to the company?

A. Only if I acquiesced in their decision, Mr. Pottish. I—each year I have been elected general counsel by the directors, and I would not think that the three Warner brothers could terminate that relationship without the approval of a majority of the directors.

On the other hand, if your question is meant to cover the further question as to whether I would remain as general counsel over the opposition of the three Warner brothers, that is a different matter.

Q. Would you, Mr. Perkins?



(Deposition of Robert W. Perkins.)

A. Remain as general counsel?

Q. Yes.           A. No.

Q. And would you remain as a director for the ensuing year over the opposition of the three Warner brothers?

A. I couldn't answer that question without knowing the circumstances under which it arose, Mr. Pottish. After all——

Q. Do you feel they have enough influence by themselves [784-165] with the Board, at the next election of the Board, if they so wished, to keep you off the Board of Directors?

A. Well, I'm elected, of course, by the stockholders for a term of two years. Our terms run two years. And I'm nominated by the Board of Directors to be a director. Unquestionably, the Warners have considerable influence with the Board.

The former question was directed to the problem as to whether I would remain as a director if asked by the Warners, and I told you frankly that I would have to know the circumstances, because I hold office as a director under mandate from the stockholders.

Q. My point is, Mr. Perkins: If at the end of your term the three Warner brothers desired to see to it that you were not nominated for the ensuing term, do you think that they could succeed in keeping you off the slate going before the stockholders?

A. I don't know. I don't know. Whether I would be a candidate is an entirely different question.

(Deposition of Robert W. Perkins.)

Q. Would you be a candidate against their wishes? A. I don't think I would.

\* \* \* \* \* [784-166]

Q. At that time, were you familiar with the facts as to whether or not Warner Bros. Pictures had ever made a similar contract with any other independent producer prior to that date?

A. Oh, I'm sure that we had made contracts with independent producers prior to that date, and subsequent to that date; and I'm sure that we've made contracts of the same general type.

Q. I am afraid I did not get my question clear. I understand that other contracts have been made by Warner Bros. with other independent producers, both [784-169] before and after that contract of September 28, 1945, but my question is: Did you know at that time, September 28, 1945, whether with regard particularly to United States Pictures, the United States Pictures contract and the particular terms in that contract regarding such things as financing or recouping of losses and the method of financing and the share of profits, the Warner Bros. had ever made a similar contract with another independent producer which was as favorable or more favorable to the independent producer?

A. I certainly believed at that date that the contract which had been negotiated with United States Pictures was in general the same as contracts which have been negotiated with other independent producers. \* \* \* \* \* [784-170]

Q. Did you at or prior to the meeting of Sep-

(Deposition of Robert W. Perkins.)

tember 28th, make an independent investigation as to whether or not the provisions of the United States Pictures contract was or was not more favorable to the independent producer than the provisions of other contracts with other independent producers?

A. No; not an investigation in the sense of looking up records and talking to people.

Q. Did Major Warner at that meeting of September 28, 1945, state that it was the recommendation of both his brothers on the Coast and himself that the contract was a good one for the company?

A. Yes. \* \* \* \* \* [784-172]

Q. With regard to that amendment, presented to the Board on August 17, 1950, by whom was that amendment presented to the Board?

A. That I don't remember. [784-174]

Q. That amendment to the basic contract: Had you seen that amendment prior to the meeting of the Board itself?

A. I don't remember.

Q. Do you remember whether or not, prior to voting on the approval of that amendment, you had made an independent investigation of whether or not the amendment was a good one or a fair one to the company?

A. No. I didn't make an independent investigation.

Q. Is it fair to say that with regard to your voting on that amendment, you relied upon the judgment and recommendation of those people who

(Deposition of Robert W. Perkins.)

were in charge of that phase of the company's business?      A. Yes.

Q. Did you at any time, Mr. Perkins, exercise any surveillance over the administration of either the basic agreement of September 28, 1945, or any amendments thereto?      A. No.

Q. Did you at any time cause anybody on your behalf, or did you yourself look into the matter of the various charges and credits which were being offered either on behalf of Warner Bros. or United States Pictures in their respective accounts under this agreement and the amendment thereto?

A. No, sir. \* \* \* \* \* [784-175]

## DEPOSITION OF JACK L. WARNER

Plaintiff's Exhibit No. 121: Deposition of Jack L. Warner, a defendant in the above-entitled action, taken on behalf of the plaintiff, at 3:00 o'clock p.m. on Friday, March 16, 1951, at 4000 West Olive Avenue, Burbank, California, before William H. Burgess, Jr., a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed Stipulation. \* \* \* \* \*

Jack L. Warner, a defendant herein, having been first duly sworn, deposed and testified as follows:

### Direct Examination

Q. (By Mr. Lyon): Mr. Warner, I presume you have had your deposition taken several times before?      A. Yes, I have.



(Deposition of Jack L. Warner.)

Q. You realize that you are under oath and will be testifying the same as you would if you were a witness in court?      A. Yes.

Q. And you will have the opportunity to go over the record made of my questions and your answers and make any corrections that you deem necessary.

On the other hand, we will have the right to question you regarding any corrections that you have made.

A. Yes, I understand.

Q. What is your position with Warner Bros.?

A. I am vice president in charge of production.

Q. How long have you held that position?

A. Ever since the incorporation of the company; since 1923.

Q. Have you been a director all of that time, too?      A. I have.

Q. Are your duties performed mainly in California?      A. Yes, they are.

Q. Has that been so from the inception of the company? [784-178]      A. Yes, it has.

Q. Do you perform any duties outside of the state?

A. Very little. What do you mean by "duties"?

Q. In connection with the corporation.

A. Yes. I am in charge of making films in London, the last few years since the quota laws of Great Britain; I supervise that work.

Q. You are in charge of making films, wherever the company makes films; is that right?

(Deposition of Jack L. Warner.)

A. Yes, virtually.

Q. Your major production is here in this studio in Burbank?

A. Yes.

Q. Beginning in about 1945, what proportion of your production has been in this studio?

A. I believe all at that time. Yes, it was; all of it was here then.

Q. When did you start production in places other than the Burbank Studio?

A. It has only been just three or four pictures in England, the last couple of years.

Q. Will you explain in a little more detail what the nature of your duties is, being in charge of production?

A. I purchase, pass on the purchasing of, stories and plays and novels. I engage the producers, the important [784-179] stars, artists, the top artists, the top directors, do the reading of the scripts, for the preparing of them for the final production, and then, in cooperation with the producer and director, supervise the editing of the films, up to their final readiness for exhibition. Or I turn it over to our laboratory. That is the best way to put it.

Q. Do you perform those duties in regard to all of the films that are produced here in the Burbank studio?

A. All the pictures produced by our corporation, yes.

Q. Does that include the pictures produced under contracts with independent producers?

A. With some I do, and some I don't. Some of

(Deposition of Jack L. Warner.)

the time, myself and others. I help everybody, in one form or another, whether I have the autonomy or not.

Q. How do you determine the extent of your help in connection with independent producers?

A. I haven't any yardstick. Just questions asked; and I go to their previews and help them on what they call editing the picture. You know, removing scenes or adding or retaking scenes, or if photography should be bad, I suggest that they remake some scenes. When they have their own autonomy, of course, it is not mandatory on their part. It is just voluntary, free advice I give them.

Q. Which independent producers have their own autonomy?      A. You mean now? [784-180]

Q. Now, that are producing now.

A. Right now there is William Cagney Productions, Norma Productions, which make pictures with Burt Lancaster, Alfred Hitchcock, and the United States Pictures. That is the four that are producing, I believe. I think that is all right now.

Q. In those the help is voluntary on your part; is that correct?

A. Yes, sort of. They take advantage of my experience, gratis.

Q. You spoke of United States Pictures; that is the company in which Milton Sperling is president?

A. I believe he is president, yes.

Q. When did you first know Milton Sperling?

A. I have known Milton Sperling for over 20 years. He worked here at this studio, and then he

(Deposition of Jack L. Warner.)

left, and the next—I watched his career, especially at 20th Century-Fox, where he produced quite a number of very important pictures, all with very top stars, and I imagine very successfully.

Q. Do you know what pictures he produced at 20th Century-Fox?

A. Offhand, *To the Shores of Tripoli*, a big technicolor picture, which was a fabulous success; *Hello, Frisco, Hello*, with Betty Grable, which I am pretty sure was a hit; [784-181] and there was one I saw with Tyrone Power—I forget who the rest of the cast was—called *Crash Dive*, a submarine picture.

I think all of them were in color, and they are pretty vivid in my mind.

Several others; I could tell you, if I could just look at a memo I made on just exactly what the pictures were.

Q. Will you do that?

A. Yes. One called *Hot Spot*, with Betty Grable; *Rings on My Fingers*. I forget who was in that now. Another one was with Sonia Heinie, called *Sun Valley Serenade*, a big hit. Those are the six top pictures. He may have made more, but I don't remember them. I do remember these top pictures.

Q. You have been referring to a memo; did you just make that recently?

A. No, I have been jotting this down for a long time, off and on.

Q. Over what period of time?

A. Two or three or four years, off and on. In



(Deposition of Jack L. Warner.)

fact, I found this little memo somewhere among some papers, a couple of days ago, going through the drawer. I may have made this at the time we were going to engage him, make the [784-182] deal with him.

Q. I was going to ask you, was that made at that time or was it made subsequent to that time?

A. I wouldn't want to say it was made since or before. I made it for one reason, just to bring fresh to my mind the pictures he had produced, and credit for such. That is all there is to it. It isn't any usual memo, just a small piece of paper.

Q. When did you first know that Warner Bros. was considering entering into a contract with Milton Sperling, for him to act, either individually or through a corporation, as an independent producer?

A. The first I heard of it was, as I say, around in 1945. I can't remember the exact dates, but my brother told me about it. Milton had come back from being in the Marines at the time, and he said he was going to go back to Fox, or some company he was going back with, and would we be interested? I said yes, if we could make the proper deal for the corporation, we would be happy to make the deal with him, because we were looking for manpower. I, too, had just returned from the Air Forces. I had been to Europe, came back fresh in mind, and held a big meeting with all our producers, directors and executives, and told them we have to get manpower to make pictures.

I could see ahead that there was going to be hard

(Deposition of Jack L. Warner.)

[784-183] sledding to get the right manpower to produce pictures, and everything I predicted then has been true, right up to this very day. It is very hard to get the right people to produce pictures.

Q. When you had that conversation with your brother, was that before the corporation United States Pictures was formed?

A. I don't know. I wouldn't know.

Q. It was before the contract was signed between United States Pictures and Warner Bros.?

A. It must have been, because my brother talked to me about it.

Q. Were you in New York at the time the board of directors approved the contract between Warner Bros. and United States Pictures?

A. I believe not, although I am not sure. I feel certain that I wasn't, but I am not positive. The record would have to show that.

Q. What I am trying to do is find out if you place the time in your mind, about when that contract was signed or approved.

A. All I know is, around six years ago, in 1945, or something like that. I couldn't tell you the exact time.

Q. Would you know about how long before it was signed, if it was before it was signed, that you discussed [784-184] with your brother the propriety of entering into such contract?

A. No, I don't know. The time would be hard to place, at this late date. All I know is that we

(Deposition of Jack L. Warner.)

made the deal with the man for a good purpose, for the corporation.

Q. Is it true that most of the contracts with independent producers are originally instituted, or instigated, by you?

A. There isn't any set pattern. My brother may have talked to some of these independent men, or I may have. I would be the one who would conclude the deals, yes, but who started the deals I couldn't tell you. We made many independent producing deals.

Q. Did you conclude the deal with Milton Sperling and his corporation, in this instance?

A. No, I didn't. When I say "conclude," I mean I stated it would be a very good thing to have any good independent production company here who could make profits for the company, or attempt to make profits, because you don't always make profits in making pictures, you know.

Q. Who worked out the terms of the agreement between Warner Bros. and United States Pictures, if you know?

A. I don't know who worked with that, I really don't.

Q. Did you go over the terms of the agreement, at any time prior to the time it was signed?

A. Yes, I went over the terms of that contract, the same as I do with every other contract.

Q. Would you say that you concluded that contract as you did the other contracts with independent producers?

(Deposition of Jack L. Warner.)

A. I would say that I was equally responsible in concluding that, as well as any other one, yes.

Q. With whom did you discuss the terms of the proposed contract?

A. I talked with our attorneys; whether in the presence of my brother or not I just can't remember. Probably he was there; I don't know.

Q. Did you discuss it with Milton Sperling?

A. No doubt I did, yes; I am sure I did.

Q. Do you remember discussing it with Milton Sperling now?

A. No doubt I did. I can't remember exactly, but I would say I did.

Q. Did you discuss with him the proportion of the cost that would be borne by each of the companies?

A. Whatever the contract states, I discussed. Terms and conditions of the contract—as you no doubt have a copy of it—tells the story that I discussed. \* \* \* \* \* [784-186]



DEPOSITION OF HARRY M. WARNER

Plaintiff's Exhibit No. 122: Deposition of Harry M. Warner, a defendant in the above entitled action, taken on behalf of the plaintiff, on Wednesday, November 8, 1950, at 2:00 p.m., at 4000 West Olive Avenue, Burbank, California, before John B. Hos-sack, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed stipulation. \* \* \* \* \*

Harry M. Warner, having been first duly sworn, deposed and testified as follows:

Direct Examination

\* \* \* \* \* [784-210]

Q. (By Mr. Lyon): Now, will you state your position with the Warner Bros. Pictures, Inc.?

A. I am president.

Q. How long have you been president?

A. Since its inception; '23, I think it was, 1923.

Q. Are you also a director? A. Yes, sir.

Q. How long have you been a director?

A. For the same time.

Q. Are you also a stockholder?

A. Yes, sir.

Q. How much stock do you hold?

A. Personally?

Q. Yes. A. At this time?

Q. Yes.

A. Oh, maybe 350 or 400,000 shares. I don't now exactly what.

(Deposition of Harry M. Warner.)

Q. Now, in September of 1945, did you hold approximately the same number of shares?

A. I would say as much or more. I don't remember exactly.

Q. And you have held approximately that number of shares since August and September of 1945?

A. Well, I would have to recall when we doubled up the shares. I am speaking numerically.

Q. Yes.

A. We doubled the stock of the company and gave a share for each share held.

Q. In other words, at some time you issued two shares for each share held by the stockholders?

A. I believe so. [784-212]

Mr. Freston: May I answer that?

Mr. Lyon: Yes.

Mr. Freston: There was a stock split up some time ago, and that simply increased the number of shares outstanding without changing the relative value of the shares as a whole.

Q. (By Mr. Lyon): Then, Mr. Warner, your proportionate number of shares has remained approximately the same since 1945?

A. Yes, sir.

Q. Where do you maintain your offices as president of Warner Bros.?

A. Here; New York.

Q. Approximately what part of your time is spent here and what part in New York?

A. Well, that I can't tell you at this moment. It

(Deposition of Harry M. Warner.)

used to be at one time more in New York than here, and of late it is more here.

Q. When did that change take place?

A. When the troubles in business come in, why, my spot changes.

Q. And since 1945 has the amount of time that you spend here increased or decreased?

A. Well, it is about the same; it has been since about '36 or '37.

Q. Would you say that you had divided your time [784-213] rather equally between your New York and Burbank office?

A. Well, I would just be guessing. It all depends where it is required, mostly.

Q. What are the general nature of your duties as president?

A. To guide this company, to make money, to be successful.

Q. Do you do any of the guiding in connection with the production of pictures?

A. It depends on what part; as to the cost of pictures, yes, and discuss what to make. We have to do that possibly a year or two in advance. You can't start and decide you are going to make a picture and turn it out the next week, put it out. It takes sometimes two or three years.

Q. Do you supervise or discuss the making of contracts to produce pictures?

A. Yes, sir.

Q. And——

(Deposition of Harry M. Warner.)

A. (Interrupting): Did you get that answer, sir?

Q. Yes.

A. Yes. Some; now, I won't say all. Now, wait a minute. I discuss contracts for the purpose of making pictures, but I wouldn't say that I discuss all. There may be a picture made here or there that I don't.

Q. I see, but if you could state a general rule, [784-214] you generally supervise the making of the contracts that result in the production of pictures?

A. The principle, yes; the principles of it.

Q. How long have you been in the motion picture business? A. 45 years.

\* \* \* \* \* [784-215]

Q. (By Mr. Lyon): Now, are you generally familiar with the date that United States Pictures, Inc., was incorporated?

A. No, I don't know.

Q. Would it refresh your recollection, that it was incorporated in August of 1945?

A. If you would say so, I would take it for granted.

Mr. Lyon: Is that correct, Mr. Schwab?

Mr. Schwab: Well, I don't have the exact date here, Mr. Lyon. We furnished it to you in the interrogatories.

Mr. Lyon: Yes, that was the date in the interrogatories.

Mr. Schwab: Well, then, that is correct.

Mr. Lyon: All right.

(Deposition of Harry M. Warner.)

Q. Now, prior to August of 1945 or prior to the formation of United States Pictures, Inc., did you discuss with Mr. Sperling the prospective formation of a corporation to produce pictures?

A. Well, I didn't discuss so much with him any formations of any corporation except that I discussed with him about coming with this company.

Q. When did that discussion take place?

A. I would say about when he came back from the [784-221] Marines, when he was discharged, after his discharge from the Marines.

Q. Where did that discussion take place?

A. Well, that I couldn't tell you, but I could tell you what caused it.

Q. Will you do that?

A. If you would like to know what caused it, I haven't any objection in telling you. There was a doctor by the name of Sam Hirshfeld, since deceased, who was my personal doctor and my brother Jack's. He came in to this room one day and said: "Well, we just carried your brother out of here," and he says, "Now, I would advise you to do something about it, because he is a pretty sick man. We have been carrying him out of here quite a few times. He is overworked, and what the ultimate result may be, we don't know." So, it was then that it occurred to me that I had better start in finding someone in whom I had enough confidence that I would want to develop into a position of my brother to operate this studio; because I certainly couldn't do it. It was then that I looked around



(Deposition of Harry M. Warner.)

and thought, "This young man has ability, and I would prefer him—I would have more confidence in him than in any one else in that position."

Q. What did you do to satisfy yourself that he did have the competency to take over that position?

A. What did I do?

Q. Yes.

A. I went about trying to get him.

Q. What did you do to make the determination that he was of that competency?

A. My own judgment.

Q. What had you seen him do that made you form that judgment?

A. Well, I have passed judgment on many a man without seeing him do anything. I have passed judgment on a man's ability by the things that he had done.

Q. What had he done that you took into consideration?

A. Well, I would have to get you an analysis of it.

Q. Was it based upon work that he had done in motion pictures?

A. In motion pictures, yes, sir. I don't know anything about him outside of in motion pictures and his career with the Marines. That is about all that I know.

Q. Was that work that he had done in motion pictures for Warner Brothers or work that he had done in motion pictures for 20th Century-Fox?

A. 20th Century-Fox mostly.

(Deposition of Harry M. Warner.)

Q. How did you familiarize yourself with what he had done for 20th Century-Fox?

A. I know the business pretty well. When somebody [784-223] has ability, I am able to judge. I have so far done pretty well in my judging.

Q. Did you judge by viewing the pictures with which he was connected, or—— A. Yes.

Q. (Continuing) ——by talking to Mr. Sperling, or how?

A. Talking to Mr. Sperling, viewing the pictures, talking to others, talking to Mr. Skouras. There are three Skouras'; so, let's not get mixed up with the three. This is Spiros Skouras I am talking about, the president of 20th Century-Fox.

Q. Did you determine——

A. (Interrupting) Pardon me. I explained to Mr. Skouras my problem, and there was no use my going any further and thinking about it unless I could get him freed from 20th Century-Fox, with whom he had a contract and who was trying to get him to sign a new contract for a number of years.

Q. Did you ascertain at that time what remuneration he was receiving from 20th Century-Fox?

A. Yes, I did; yes. As I recall, I think he was getting \$1,250 a week, and they were trying to get a new contract with him for twice that much.

\* \* \* \* \* [784-224]

Q. Now, when did you first discuss with Mr. Sperling your plans for him?

A. At that time.

(Deposition of Harry M. Warner.)

Q. Would that be before the corporation, United States pictures, Inc., was incorporated?

A. Oh, yes, quite a time before.

Q. And would that be a number of months before or longer?

A. Oh, I think it was quite a time. If I was asked to the best of my recollection, I would say it was not less than eight months; maybe longer than that.

Q. Now, did you have any discussions then with Mr. Sperling as to how you would work out your plans for him?

A. I had no discussions with Mr. Sperling about how he was to work for us or what he was to do until I was assured that 20th Century-Fox would let him go. [784-225]

Q. I see.

A. Because I understand there was quite a battle there; that is, I was told that they didn't want him to go.

Q. After Mr. Skouras gave the release, then did you discuss with Mr. Sperling what the arrangements would be between him and Warner Brothers?

A. We discussed from time to time how we could go ahead and get something together that could bring him in with this company, with the understanding that if some misfortune should happen, that he would be able to take over my brother's place, relieve me of that responsibility.

Q. Were those discussions between Mr. Sperling



(Deposition of Harry M. Warner.)

and yourself alone, or were others present when they took place?

A. Oh, I couldn't tell you. There were quite a number of discussions pertaining to a business deal.

Q. And that would be discussions over a period of several months?

A. I would imagine, as I recall.

Q. Now, during those discussions, was it discussed whether he would come in on a salary or as an independent producer?

A. Well, now, that was in my own mind in order to develop a man to have—to occupy the position that I would want him to occupy here, take the place of my brother. I felt that he ought to get a good experience, a business experience, without just writing stories or making pictures. [784-226] The motion picture business is no different than any other business; you have to have business experience in addition to the knowledge of making a picture; and then when I found that I could get him loose, I set about to see how I could get a good business man to hook up with him and get him an experience that a man in that kind of a position would require, and I got him Joe Bernhard. Now, Joe Bernhard was the man that I brought into this business from the real estate business and taught him how to operate our theatre business. And in particular, in those days, he needed a lot of teaching, because business was bad, plenty of debts—I don't know how much—a hundred and fifty, sixty or

(Deposition of Harry M. Warner.)

eighty million. You had to meet the payrolls, you know, and the expenses.

Q. Yes.

A. So that I had trained Mr. Bernhard, until one day I said, "You go ahead from here on and run that end of the business." I thought that the combination of Sperling as a producer and Bernhard as a business man would be a good combination to learn what this was all about.

Q. Yes.

A. You could have the best producing man in the world right here to make pictures, but you need a little more than that.

Q. Now, did you discuss with Mr. Bernhard the [784-227] possibility that he would join forces with Mr. Sperling to have this independent producing company?      A. Yes, sir.

Q. Did you discuss that with Mr. Bernhard prior to the actual formation of the corporation, United States Pictures?

A. Yes, sir; because Mr. Bernhard, you must remember, had a pretty good job with us. I think he was drawing \$3,000 a week, and bonus; and when you ask a man to give up a position of \$3,000 a week and a pretty good bonus, why, you naturally discuss it with him. Now, the thing that I was interested in was that I myself wasn't so well. You see, I had been in the hospital a few times myself and I wasn't as healthy as I was, and I was looking to create a combination to take the place of even myself.

(Deposition of Harry M. Warner.)

Q. Did you discuss this with Mr. Bernhard over perhaps a period of six months prior to the actual formation of the corporation, too?

A. I don't remember how long, but we started in slowly and developed the talks.

Q. Were those talks generally between the three of you; that is, yourself, Mr. Bernhard and Mr. Sperling?

A. No; I discussed this thing with each one at first separate, because it was the only way I could do it.

Q. Yes. [784-228]

A. And then I brought them together to see if the two could work together. That was the big problem.

Q. Then as you discussed it with them, either separately or together, did you discuss whether it would be an independent producing venture rather than their acting as employees of Warner Brothers?

A. I discussed with them that they should start in the best way that they could get the most education in the operating and the operation of a business of that type; because you must bear in mind that Mr. Bernhard was not familiar with the production end.

Q. Did you discuss with them the formation of a corporation to carry on their production rather than the lack of corporation?

A. As I recall now, I don't think I had anything to do with that, how the corporation was to

(Deposition of Harry M. Warner.)

be formed or what the name was to be. I may have heard it, but I don't think I played any part in that; not that I remember.

Q. Did you discuss with them what percentage of the net profits of the pictures the independent producing venture would receive as opposed to the percentage that Warner Brothers would receive?

A. I laid out the formula that the company, if the two could get together, that—I laid out the formula that [784-229] the company should operate under, and took it up with my brother, and we agreed upon that plan.

Q. And that was basically the formula that was eventually incorporated into the written agreement?

A. No, wait a minute. I merely laid out the plan. I turned it over to Mr. Freston here, as the attorney, and told him to write up a deal—I first explained to him why I wanted it done, and then I told him to write up what was fair to the company, and he did it. I don't think I ever saw it after that. He explained it to me, and when I was sure that he had satisfied himself it was a deal that was fair for all parties concerned, why, that was the end of it, so far as I was concerned.

Q. Did you discuss with them prior to the actual drafting of the contract how the Warner Brothers' overhead would be figured?

A. Yes. I think when it came around to that, I asked our New York people what our overhead was, because I didn't believe that in order to form a company with men of that type and for the pur-



(Deposition of Harry M. Warner.)

pose that you want to use them, you should make money except through their efforts—not on them, but through them—and if I recall, I was told what our overhead was for distribution, and I did that with Mr. Kalmenson. He is our general sales manager. I increased the amount from what it cost. I can't recall as to whether [784-230] they told me it was—it seems to me that they told me at that time it was 14 per cent for distribution in this country.

Mr. Freston: Pardon me for interrupting a minute. I think you are getting away from counsel's question. He asked you about overhead and not about distribution costs.

The Witness: Oh, overhead?

Mr. Freston: Overhead.

The Witness: I consider that overhead; that is overhead, too.

Mr. Freston: He means overhead for use in the facilities of the studio.

The Witness: For the studio, I think I asked Price, Waterhouse to set that up. If I recall right, I think I asked Price, Waterhouse, who are our accountants, to set up what would be a fair deal. That is the way I recall it.

\* \* \* \* \* [784-231]

Mr. Levy: I offer Exhibits 85-A and 85-B, 85-A being an employment contract between United States Pictures and Charles Yoss; 85-B being an employment contract between United States Pictures and Donald Hyde.

Mr. Williams: To which we object on the grounds



they are incompetent, irrelevant, and immaterial, not tending to prove or disprove the issue now before this court; on the further ground both of them are hearsay. [822]

The Court: What is the purpose of this offer?

Mr. Levy: The purpose of these contracts is to show the course of dealing between Warner and United.

The Court: For that purpose the objection is overruled.

Mr. Williams: Warner was not a party to these contracts. The contracts could not possibly show that.

Mr. Levy: Notwithstanding that, Warner was, by the terms of this contract, affected by the entry into these contracts which are offered in evidence.

The Court: I have ruled in favor of their admissibility.

Mr. Levy: I am sorry, sir.

The Court: Exhibits 85-A and -B are received in evidence. [823]

\* \* \* \* \*

The Court: Your next offer.

Mr. Levy: Exhibit No. 97-A-1 and A-2.

The Court: Two contracts with John Flynn apparently.

Mr. Levy: Yes, your Honor.

Mr. Williams: These are contracts with actors and actresses.

Mr. Levy: Yes, the contracts with John Flynn I will offer.

The Court: Are they here?

Mr. Schwab: No. I have them, your Honor.

The Court: Is there objection to the offer?

Mr. Williams: Yes, we will object to them upon the grounds they have no tendency to prove this issue involved now before this court and they are irrelevant and immaterial. [842]

\* \* \* \* \*

The Court: Very well. The objection is overruled. Exhibits 97-A-1 and 97-A-2, the Flynn contracts, will be received in evidence. [843]

\* \* \* \* \*

The Court: Do you have other witnesses you expect to call on these issues as to jurisdiction and limitations other than Mr. Obringer? Can you give me some estimate of when you will be able to rest on that issue? [848]

\* \* \* \* \*

The Court: Do you expect to offer that in evidence? Do you wish me to read that this evening?

Mr. Levy: The Bernhard deposition?

The Court: Yes.

Mr. Levy: Mr. Williams made a condition to the offer. In other words, he attached to his stipulation a condition that I will not call Mr. Bernhard, and I asked your Honor——

The Court: On these two issues.

Mr. Williams: On these two issues, yes, your Honor.

Mr. Levy: On these two issues. And I asked your Honor to permit me to defer my decision on that until I shall have had the opportunity to read

again through these Bernhard depositions, until tomorrow.

The Court: Very well. I expect to read Exhibit 122 in evidence, the deposition of Harry M. Warner, to complete that this evening, and if it would save time I would read Exhibits 123-A, B, C and D.

Mr. Levy: Yes, if Mr. Williams had not made the condition, I would be perfectly satisfied to do that.

The Court: Perhaps you could ameliorate the situation [854] by stating whether or not, so far as you are advised, you have any intention of calling Mr. Bernhard on the trial of these two issues.

Mr. Levy: At the present time I have no such thought of calling him.

The Court: On counsel's statement, can you eradicate the condition or remove the condition from the stipulation that Rule 26(d)(2) and (f) will apply to the Bernhard deposition, so the witness Bernhard will be considered an adverse party within the meaning of the rule?

Mr. Williams: Yes, your Honor, I will do that.

I may say that, as a practical matter, I have no doubt that the court will so regard him anyway.

\* \* \* \* \* [855]

(Plaintiff's Exhibit 123-A, -B, -C and -D for identification was received in evidence.) [856]

\* \* \* \* \*

The Court: This agreement of October 31, 1945, between United and Warner and the New York Trust Company is in evidence here as exhibit what?

Mr. Levy: That is in evidence here, your Honor,  
as Exhibit 8. [860]

\* \* \* \* \*

## DEPOSITION OF JOSEPH BERNHARD

Plaintiff's Exhibit 123-A: Deposition of Joseph Bernhard, a witness in the above-entitled action, taken on behalf of plaintiff Edward S. Birn, at 2:00 p.m. on Thursday, May 8, 1952, at 735 Van Nuys Building, 210 West 7th Street, Los Angeles, California, before Frank Hanna, a Notary Public within and for the County of Los Angeles and State of California, pursuant to notice annexed.

\* \* \* \* \*

### Direct Examination

\* \* \* \* \* [862]

Q. (By Mr. Levy): Mr. Bernhard, you were a director of Warner Brothers prior to September 10, 1945?      A. Yes.

Q. Were you also an employee of Warner Bros. prior to that time?      A. Yes.

Q. Were the terms and conditions of your employment reduced into writing?

A. Yes. [862-3]

\* \* \* \* \*

Q. What was your weekly salary before you quit Warner Bros.?

A. Well, with expenses, it was \$3000 a week.

\* \* \* \* \* [862-5]

Q. What department in Warner Bros. did you head?      A. Theatre.

(Deposition of Joseph Bernhard.)

Q. Just what does that mean? Will you give us a brief description of your duties?

A. Well, general manager of approximately 480 theatres—operating theatres. [862-6]

\* \* \* \* \*

Q. Mr. Bernhard, in a deposition of Mr. Harry Warner taken on November 8, 1950, Mr. Warner stated that he got you for Mr. Sperling—meaning that he arranged for the association between you and Milton Sperling in U. S. Pictures. Is that so?

Mr. Williams: Just a moment. I object to that as calling for a conclusion and speculation and opinion on the part of the witness, and an improper comment on the testimony of another witness, leading and suggestive; and incompetent, irrelevant and immaterial, for the reasons stated.

Q. (By Mr. Levy): Will you answer the question? A. Repeat it, please?

Mr. Williams: The question also calls for a conclusion as to what Harry Warner meant by certain language he is purported to have used.

Q. (By Mr. Levy): Let me put it this way: Did Mr. Harry Warner approach you to associate yourself in business with his son-in-law, Mr. Sperling? A. Yes. [862-10]

\* \* \* \* \*

Q. When Harry Warner first approached you on the proposition, just briefly what was the conversation between you? [862-11]

A. That he thought it would be a very good plan for Milton and I to get together. Milton knew one



(Deposition of Joseph Bernhard.)

end of the business and I knew the other, and we could produce some pictures to release through Warner Bros. It appealed to me, because in those days—as it is today—no matter if you got a high salary, you could not retain much of it. So I saw the opportunity of probably building up an estate for myself. Therefore it appealed to me. You see I knew all the exhibitors throughout the country; I knew distribution; and my work in that end would prove very advantageous. [862-12]

\* \* \* \* \*

Q. It was not at the first conference that you told Mr. Warner that you were satisfied, was it?

A. No. The first few conferences were more or less gossiping conversations.

Q. The proposition was made to you, Mr. Bernhard, and you took time out to consider it? Is that what you mean?

A. I took a great deal of time to consider it.

Q. I assume you called on Mr. Warner again, and talked to him about it?

A. Oh, yes. You see, the visits were far apart; because he was out here and I was in New York.

Q. At that time?

A. Yes. We talked every time we met, whether it was in New York or California. [862-13]

\* \* \* \* \*

Q. Well, as a matter of fact, your first conversation with Mr. Sperling amounted to practically this: If we get a deal that is satisfactory to the two

(Deposition of Joseph Bernhard.)

of us from Warners, we will become 50-50 partners; is that what you mean?

A. Correct.

Q. That is all there was to that conversation; is that right?      A. That is right.

Q. What did you do after that? Did you go to see Mr. Warner?

A. Then we approached Mr. Warner.

Q. Both of you?      A. That is right.

Q. And?

A. And we eventually made the deal. [862-17]

Q. I am not talking about eventually. I know you eventually made the deal. But I am trying to get to the negotiations that you had with Mr. Warner, before the deal was outlined finally. Or did you have any negotiations with Mr. Warner?

A. Yes, certainly.

Q. What was the bargaining, if there was any?

A. Well, I don't recall the bargaining. I tried to make a fair deal for both sides.

Q. Did you tell Mr. Warner what you thought a fair deal would be?

A. I suggested a certain deal.

Q. What deal did you suggest?

A. Well, there were modifications eventually made in it, for example, if we were to produce pictures on the lot and I had a discussion on the overhead that they would charge; and we agreed on the overhead, eventually. I thought it was rather high. Now, this is from the United Pictures end. I thought the overhead was very high; because if we

(Deposition of Joseph Bernhard.)

went out and produced our pictures on the outside, I could have benefitted that overhead—or lowered that overhead to—well, probably 20 per cent.

Q. You knew that at the time? A. Yes.

Q. Had you had any experience with the production [862-18] department at all with Warner Bros.?

A. I knew all the bookkeeping phases.

Q. Do you know what Warners' overhead was at that particular time, in 1945, the actual overhead cost?

A. Yes. At that time it was rather high for an independent producer.

Q. Do you know in terms of percentages what the actual overhead of Warners was at the time?

A. Yes; it was over 30 per cent.

Q. Over 30 per cent?

A. Yes. So we finally settled—Do you want to know what we came to——

Q. Yes.

A. We finally settled that Price, Waterhouse would compute the proportion of the pictures to their overhead and we would be charged the proportion that Price, Waterhouse stated would be fair. I think that is even in the contract with Warner Bros.

Q. Yes, it is.

A. (Continuing) And we also discussed the distribution terms; and we finally settled on the terms that are in the agreement.

(Deposition of Joseph Bernhard.)

Q. Do you know what Warners' distribution cost at that time was—actual cost?

A. Yes; I think it was about 16 per cent, actual cost, if my memory serves me right. [862-19]

Q. Who suggested the 20 per cent distribution figure?

A. Well, it was finally compromised on 20 per cent; but that was good terms in those days; because I know——

Q. (Interposing): Good terms for whom?

A. For Warner Bros. Because I know that independent producers were releasing through United Artists for 20 per cent; and I know that Sam Goldwyn at that time was releasing for 17½ per cent. \* \* \* \* \* [862-20]

Q. Well, specifically, were there any arrangements made between you and Warner with respect to your getting \$78,000 as severance pay, prior to your resignation?      A. Yes.

Q. When were those arrangements made?

A. At the time that I resigned.

Q. That was after you had agreed in principle on your association with Mr. Sperling in U.S. Pictures?

A. That is right; because I still had to spend quite a bit of time with the Theatre Department and my successor to—if I may use the term—break him in.

Q. How long did you break him in?

A. Oh, I don't know. I practically commuted back and forth from here to New York; but while

(Deposition of Joseph Bernhard.)

in New York I spent all my time in the theatre department; because there were quite a few things that I, personally, had to attend to, for the theatre department. [862-21]

Q. In consideration of that you got \$78,000; am I to understand that?

A. There was no consideration; it was just severance pay. I thought that, after being with the company for near onto twenty years, I was entitled to the severance pay.

Q. And you made that a condition to your resigning; is that right?

A. Well, I will not say it was a condition, no.

Q. Well, was it an offer made to you by Warner?

A. No. It was a suggestion made by me and acted on by the Board—not Mr. Warner.

Q. When you suggested it to Mr. Warner, what was his response?

A. That we will put it up to the board. Because the board acted on it, I remember that.

\* \* \* \* \* [862-22]

Q. In negotiating the deal with Mr. Harry Warner, before the contract was drafted, was it understood that you were not to risk any capital and that Mr. Sperling was not to risk any capital, beyond the original investment of \$25,000?

A. No, there was no understanding on that. I was supposed to obtain the first money for each picture — the bank money — not Warners; but I was to.



(Deposition of Joseph Bernhard.)

Q. You were to function, then, in obtaining a loan [862-24] from a bank, to begin the production of these pictures? Is that what you mean?

A. That is right.

Q. Was it then understood that you would not invest any of your own money beyond this \$25,000?

A. There was never any discussion on it, that I can remember.

Q. In other words, it was assumed by both parties that Warners would advance half of the cost of each production, and that you would provide the other half, through banking connections?

A. That is right.

Q. And you did?                    A. I did.

Q. What was your total investment in this whole deal with United States Pictures?

A. Outside of my time—which, if I had been with Warners, would have been paid for——

Q. I am not talking about your time; but what was the total financial investment that you made?

A. I think it was \$25,000.

Q. You invested \$25,000 cash?

A. No.

Q. What was your total investment?

A. Twelve five. [862-25]

Q. Beyond that you did not invest any money; is that right?                    A. That is right.

Q. How much did you come out with at the end?

A. Gross, \$400,000. \* \* \* \* \* [862-26]

Q. I think I understand what you mean. What caused you to sell out, under those conditions?

(Deposition of Joseph Bernhard.)

A. Well, we will say a disagreement on policies.

Q. Can you give us an idea of what that disagreement was based on, or involved, briefly?

A. In policies of what we should do—kind of pictures.

Q. Well, what did you think you should do?

A. I thought we should make less expensive pictures.

Q. When you say less expensive pictures, you mean limiting the budget to approximately how much?

A. Oh, I would say about seven-fifty.

Q. And what was Mr. Sperling's idea?

A. Well, he wanted the higher priced pictures.

Q. By higher price, what do you mean?

A. Higher cost.

Q. Two million dollars or more?

A. No, I don't say that.

Q. A million and a half?

A. Yes. It was just a disagreement on policy.

Q. Was that the only disagreement between you?

A. That is all. \* \* \* \* \* [862-31]

Q. What part did Mr. Prinzmetal play in this thing?

A. He represented Gary Cooper. Gary has no agent.

Q. Do you know that Mr. Prinzmetal received \$25,000 in connection with the acquisition of Gary Cooper's services?      A. That is right.

Q. Can you give us the detail of that deal, briefly?

(Deposition of Joseph Bernhard.)

A. That is all it was. That was the condition.

Q. Tell me exactly what happened.

A. In order to get Gary Cooper, we paid a commission.

Q. You paid Mr. Prinzmetal a commission of \$25,000?

A. That is right. [862-36]

Q. As an agent's commission?

A. As attorney and agent.

Q. Did he ever perform legal services for you?

A. No. \* \* \* \* \* [862-37]

Q. What part of this \$25,000 was charged to Warner Bros.?

A. It all came under the cost of actors. This is off the record.

(Discussion off the record.)

\* \* \* \* \* [862-38]

Q. May I assume that, had you passed up the suggestion, shall we say, of Mr. Warner, that you associate yourself with his son-in-law, that it would have had no effect on the renewal of your contract?

A. None whatsoever. I will say that emphatically. None whatsoever. \* \* \* \* \* [862-41]

Q. Did you personally guarantee any of the U.S. obligations?

A. I don't recall. But morally I was in back of it; because my connection was the New York Trust Company. That was not Warner Bros.' connection. For your information, while we are on the subject of the New York Trust, I originally got the New York Trust many years ago—probably a year after

(Deposition of Joseph Bernhard.)

I was with the company—to loan Warner Bros. some money. That was during the dark days.

Q. You arranged for that loan?

A. I did.

Q. Through Mr. Bierwirth?

A. Through Mr. Bierwirth. I knew Mr. Bierwirth. Not until we got the loan did any of the Warners meet Mr. [862-53] Bierworth.

\* \* \* \* \* [862-54]

Q. Did you have a residence here in California during that time?      A. No.

Q. Did your residence ever change?

A. Never. I always voted in New York; still do.

\* \* \* \* \* [862-79]

Q. Did you ever have any conversation with Mr. Jack Warner or Mr. Harry Warner prior to your splitting, as you call it, with Mr. Sperling, and in which you informed them, in substance, that you had a disagreement with Mr. Sperling, and that [862-105] you intended to split?

A. It was only to tell them that we intended to split on account of a disagreement in policy.

Q. With whom was that conversation had?

A. With Mr. Harry Warner.

Q. Do you recall what Mr. Harry Warner's response was?      A. Sorry to see it happen.

Q. That is all?

A. That is the sum and substance of it.

Q. Mr. Harry Warner did not urge you to remain?

A. Mr. Harry Warner was very sorry, and

(Deposition of Joseph Bernhard.)

would like it if we could clear up the situation—yes, he wanted me to remain.

\* \* \* \* \* [862-106]

Q. Did Mr. Harry Warner express any opinion as to who was right?           A. No.

\* \* \* \* \* [862-107]

Q. Where were the arrangements made for the sale of the stock? Were they made here in California or in New York?

A. In New York.

Q. In other words, your conversations with respect to the sale of the stock were had with Mr. Sperling in New York?

A. They were had with Mr. Sperling out here, and then back in New York with Stanleigh Friedman.

Q. At Mr. Friedman's office?           A. Yes.

\* \* \* \* \* [862-114]

Q. Is the Mr. Stanleigh Friedman that you refer to a director of Warner Bros.?           A. Yes.

\* \* \* \* \* [862-115]

Q. Did you or did you not resign as a director of Warner Bros. on the strength of having executed this agreement dated August 31, 1945?

A. The date of my resignation is a matter of record. I think that was brought out, was it not?

Q. I will tell you. The date of your resignation is September 10, 1945, ten days subsequent to the signing of this agreement. Now I ask you whether or not it was upon the strength of this agreement that you resigned as a director of Warner Bros.



(Deposition of Joseph Bernhard.)

Mr. Williams: You are speaking now of the agreement on the 31st of August?

Mr. Levy: That is right.

The Witness: Naturally.

Q. (By Mr. Levy): Prior to your resignation from Warner Bros. had you told Mr. Harry Warner or Mr. Jack Warner, or either or both of them, that you had entered into this agreement of August 31, 1945, with Mr. Sperling?

A. It was the reason for my resignation.

\* \* \* \* \* [862-154]

## DEPOSITION OF OLIVER B. SCHWAB

Plaintiff's Exhibit 124: Deposition of Oliver B. Schwab, a witness herein, taken on behalf of the plaintiff, at 10:00 o'clock a.m., Thursday, July 24, 1952, at 141 El Camino Drive, Beverly Hills, California, before Edward A. Oreb, a Notary Public within and for the County of Los Angeles and State of California, pursuant to Notice and Subpoena heretofore served on the attorneys for the defendants and subpoena duces tecum heretofore served on the witness. \* \* \* \* \* [862-157]

### Direct Examination

Q. (By Mr. Levy): What is your full name?

A. Oliver B. Schwab.

Q. You are the Secretary of the United States Pictures? A. That is correct. \* \* \* \* \* [862-160]

Q. (By Mr. Levy): Did you participate in any

(Deposition of Oliver B. Schwab.)

of the negotiations between Milton Sperling and/or Joseph Bernhard with Harry and Jack Warner before September 28, 1945, which is the date of the first contract entered into between U.S. Pictures and Warner Bros.?

A. I would say that the negotiations of that agreement were carried on by Mr. Bernhard and Mr. Sperling and that I [862-165] was not a negotiator. \* \* \* \* \*

Q. Well, let me preface the clarification by this question: Did you participate in the drawing of that contract?

A. Only to this extent: As I recall, the contract was drawn by Freston & Files and I looked at it before it was signed. As I recall, I had a discussion or two with Mr. Herbert Freston about it, as a result of which there may have been a few changes made in the contract and that was my relationship to the contract. \* \* \* \* \* [862-166]

Mr. Levy: Your Honor, Exhibits 93-A and 93-B are minute books of the defendant United States Pictures. They are in two volumes. I do not see the necessity at this time of offering both volumes physically in evidence. I am particularly interested, however, in offering two pages, which are contained in Exhibit 93-A. May I offer those two pages in evidence?

The Court: Do they comprise the minutes of a certain meeting?

Mr. Levy: Yes, sir. \* \* \* \* \*

Mr. Williams: I will object to it on behalf of

the Warner defendants on the ground there is no proper [884] foundation laid as to them. It is hearsay as to them. And, also, generally, I object to it on the same grounds stated with reference to Exhibit 39.

The Court: Wherein is the foundation lacking?

Mr. Williams: It is not being shown that Warner Bros. had anything to do with what transpired at the meeting or was present at the meeting. I don't raise any objection to foundation as to authenticity of the minutes, your Honor.

The Court: The objection is overruled. You may, if advised, read the excerpt into the record, in lieu of marking the physical exhibit into evidence, if there is no objection.

Mr. Williams: No objection to that.

Mr. Levy: "Minutes of a Special Meeting of the Board of Directors of United States Pictures.

"A special meeting of the Board of Directors of United States Pictures was held at 4000 West Olive Avenue, Burbank, California, on January 2, 1947, at 10:00 o'clock a.m., pursuant to waiver of notice signed by all of the directors of the corporation, which notice was ordered filed with the minutes of the meeting.

"There were present in person Messrs. Milton Sperling, J. C. Yoss, and Oliver B. Schwab, being all [885] of the directors.

"Mr. Sperling acted as chairman of the meeting and Mr. Schwab acted as secretary.

"Mr. Yoss made a motion, which was duly sec-

ended by Mr. Schwab, that the following resolution be passed:

“Resolved: That it is the opinion of this Board of Directors that Mr. Sperling in attending business, semi-business, and social functions in and about the motion picture industry, and in associating with and entertaining at the Hillcrest Country Club and in restaurants and in night clubs and in his home, producers, writers, directors, stars, agents, and other persons in and about the motion picture industry during the past year, and from this time forward, has incurred entertainment and other expenses which are for the benefit of and therefore have been incurred for and on behalf of the corporation;

“That it was the intention of the corporation in paying to Mr. Sperling the sum of \$1000 per week during the year 1946 to have Mr. Sperling bear such ordinary and usual expenses for and on behalf of the corporation out of said sum of \$1000 per week, and that accordingly said \$1000 [886] per week represents compensation in part and in part an allowance for usual and ordinary business expenses incurred by Mr. Sperling for and on behalf of the corporation;

“That said \$1000 per week was not intended, however, to cover any extraordinary or unusual expenses (such as, but not limited to, traveling expenses), and that this corporation shall reimburse Mr. Sperling for any and all unusual and extraordinary expenses heretofore or hereafter incurred by him for and on behalf of the corporation.”



End of resolution.

"The motion was unanimously passed by the affirmative votes of Mr. Yoss and Mr. Schwab, Mr. Sperling refraining from voting.

"Thereupon Mr. Yoss made a motion, which was duly seconded by Mr. Schwab, that the following resolution be passed:

"Resolved: that commencing January 1, 1947, Mr. Sperling's salary from the corporation be raised from \$1000 per week to \$1250 per week;

"And further resolved: that it is in the best interests of this corporation that Mr. Sperling, as President of the Corporation and as producer of its pictures, attend all business, semi-business, [887] and social functions possible in and about the motion picture industry, associate with and entertain at the Hillcrest Country Club, at the Racquet Club, the restaurants and night clubs and at his home, producers, writers, directors, stars, agents and other persons in and about the motion picture industry;

"That the corporation disburse to Mr. Sperling, in addition to his salary as aforesaid, an expense allowance in the amount of \$250 per week to cover all usual and ordinary entertainment and other expenses incurred by Mr. Sperling on behalf of and for the benefit of the corporation;

"And that if at any time hereafter Mr. Sperling incurs any extraordinary or unusual expenses for and/or on behalf of the corporation (such as, but not limited to, traveling expenses), the corporation shall, of course, further reimburse Mr. Sperling for such unusual and extraordinary expenses."



End of resolution.

“The resolutions were unanimously passed by the affirmative votes of Mr. Yoss and Mr. Schwab. Mr. Sperling refrained from voting.

“There being no further business to come before the meeting, on motion duly made, seconded, [888] and carried, the meeting is adjourned.”

Signed: “Oliver Schwab, Secretary.”

\* \* \* \* \* [889]

The Court: The Yoss deposition, Exhibit 125-A, -B, -C, -D, -E will be incorporated by reference into the reporters’ transcript at this point and may be copied therein if counsel so arrange with the reporter.

(The documents marked Plaintiff’s Exhibits 125-A to -E, inclusive, were received in evidence.) \* \* \* \* \* [900]

## DEPOSITION OF JOSEPH CHARLES YOSS

Plaintiff’s Exhibit No. 125A: Deposition of Joseph Charles Yoss, a witness produced on behalf of the plaintiff herein, taken on Tuesday, August 5, 1952, at 1:30 p.m., at 141 El Camino Drive, Beverly Hills, California, before Edward A. Oreb, a Notary Public within and for the County of Los Angeles and State of California, pursuant to oral stipulation. \* \* \* \* \* [901]

### Direct Examination

Q. (By Mr. Levy): What is your full name, sir? A. Joseph Charles Yoss.

Q. Where do you reside?

(Deposition of Joseph Charles Yoss.)

A. North Hollywood, California.

\* \* \* \* \* [901-1]

Q. (By Mr. Levy): What is your business, Mr. Yoss?

A. I am treasurer and vice-president of the United States Pictures, Incorporated.

Q. Have you any other business?

A. No.

Q. Are you a Certified Public Accountant?

A. No.

Q. Are you an accountant? A. Yes.

\* \* \* \* \* [901-2]

Q. What position did Mr. Donald Hyde occupy in the company during the time that he was there?

A. Vice-president.

Q. He was not a director, was he?

A. I don't remember.

Q. What were his duties, generally?

A. An executive assistant to Milton Sperling.

Q. Can you give us an idea of what that means?

A. May we go off the record here for a moment?

Q. Yes.

(Discussion off the record.)

The Witness: He reviewed stories; interviewed talent; criticized plays, material; assisted in the production duties [901-5] assigned to him by Milton Sperling and generally duties of this nature.

Q. (By Mr. Levy): What sort of production duties were assigned to him by Mr. Milton Sperling? A. I don't remember.

(Deposition of Joseph Charles Yoss.)

Q. Is that the best answer you can give me to that question?

A. Other than what I told you just before.

Q. Well, I asked you whether you can—

Mr. Williams: Let us not get into an argument with the witness. He has answered your question. Now, let us not start arguing.

Mr. Levy: Mr. Williams, may I call your attention and the witness' attention to the fact that Mr. Donald Hyde received a salary of a thousand dollars a week.

Mr. Williams: Well, what difference does that make?

Mr. Levy: And it seems to me that it is both relevant and material for the plaintiff to know—for the purposes of this trial—what this man was paid a thousand dollars a week for.

Mr. Schwab: He has already told you that he was executive assistant to Sperling and assisted him in everything Sperling had to do.

Mr. Levy: Well, he didn't say that.

Mr. Schwab: Well, I think it was implicit in his [901-6] answer, when he said he was executive assistant to Milton Sperling.

Mr. Levy: I will adopt Mr. Schwab's suggestion.

Q. Did you assist Mr. Sperling in everything that he was called upon to do?

Mr. Schwab: What do you mean, did he or did Hyde?

Mr. Levy: Did Mr. Hyde?

(Deposition of Joseph Charles Yoss.)

The Witness: If Mr. Sperling requested it, I would say yes.

Q. (By Mr. Levy): Would you call Mr. Donald Hyde an assistant producer?           A. No.

Q. I take it, then, that he was less than an assistant producer but more than an ordinary employee when you called him an executive; is that the idea?           A. Yes.

Mr. Schwab: You called him what?

Mr. Levy: An executive.

The Witness: I would not answer thusly.

Q. (By Mr. Levy): Well, how would you answer the question?

A. As I have heretofore.

Q. And you can't improve on that?

A. That is right. \* \* \* \* \* [901-7]

Q. Throughout the extended period provided for by the two amendments that I have just read, and down to the present time, has United States Pictures produced any "original" pictures?

A. Not beyond the first three pictures.

Q. Will you please state the names or titles of all pictures produced to date in the order in which they were made?

A. Cloak and Dagger, Pursued, My Girl Tisa, South of St. Louis, Three Secrets, The Enforcer, Distant Drums and Retreat Hell.

Q. It is a fact, is it not, that the first three [901-10] pictures that you named were produced as "original" pictures and the remaining five were

(Deposition of Joseph Charles Yoss.)

produced as "additional" pictures? A. Yes.

\* \* \* \* \* [901-11]

Q. (By Mr. Levy): Thank you. It is a fact, is it not, Mr. Yoss, that My Girl Tisa turned out to be a financial loss, a loss in excess of a million dollars?

A. There was a loss on My Girl Tisa in excess of a million dollars. [901-30]

\* \* \* \* \*

Q. In dollars and cents, Mr. Yoss, approximately how much of Warner Bros.' advances to United States Pictures in the form of cash and/or facilities in connection with the cost of production of My Girl Tisa, including all overhead allocated thereto, still remained unrecouped by Warner Bros.?

\* \* \* \* \*

The Witness: I believe approximately \$670,000 as of about March 1st.

Q. (By Mr. Levy): Of 1952?

A. Of 1952.

Q. Will you fill in the exact amount in the space immediately below it? A. Yes.

(Information above requested): \$668,108.76.

Q. (By Mr. Levy): In your most recent balance sheet, is My Girl Tisa carried as an asset by United States Pictures? A. Yes.

Q. At what estimated realizable value is it so carried?

A. I don't recall at the moment.

Q. Can you approximate it? [901-32]



(Deposition of Joseph Charles Yoss.)

A. No.

Q. Will you fill in the amount immediately below?  
A. Yes.

(Information above requested): No realizable value. [901-33]

\* \* \* \* \*

Q. Is the figure that you will fill in representing the unrecouped monies advanced by Warner Bros. in connection with Mr. Girl Tisa including all overhead allocated to that picture carried on your books now as a debt to Warner Bros.?

A. It is carried on my books as a contingent liability. [901-34]

\* \* \* \* \*

Q. (By Mr. Levy): Now, you testified, Mr. Yoss, to the total cost of production of the three "original" pictures, namely, Cloak and Dagger, Pursued and My Girl Tisa; that is to say, you gave us the total of each picture. I have totaled these figures and the grand total is \$5,170,962.35.

Would you like to check that total?

A. No, I will take your word for it. [901-127]

\* \* \* \* \*

Now, I ask you this question: In the \$5,170,962.35 figure, which you testified as the total cost of the production of the three "original" pictures, was there included the 1946 and 1947 write-offs on literary properties purchased and those written for the company but not used in the production of any

(Deposition of Joseph Charles Yoss.)

picture heretofore produced and charged to U. S. Pictures' overhead?

A. I believe I have answered that in my answers to the interrogatories of a certain date.

Q. Well, can you answer that question yes or no?

Mr. Schwab: Read the question back, will you, please?

(The question was read by the reporter.)

The Witness: Yes.

Q. (By Mr. Levy): And the amount of the 1946 write-off in such connection was \$59,935.63?

A. Yes.

Q. And the amount of the 1947 write-off in such connection was \$43,656.99?

A. In both instances I have confirmed these answers from interrogatories which I have previously given.

Q. Yes. But is that figure correct?

A. Yes, the figure is correct. [901-130]

\* \* \* \* \*

Q. Now, you use the words "production overhead." Do you distinguish production overhead from any other type of overhead?

A. Yes. [901-194]

Q. Now, what are the distinguishing features, and how do you run your books on those things?

A. I consider items as being production overhead when they indirectly affect in some manner the production of a picture.

Q. Of a picture produced, you mean?

(Deposition of Joseph Charles Yoss.)

A. Not necessarily.

Q. Or a picture produced or not necessarily produced?

A. Both or either, and I don't consider it production overhead when it is corporate expense.

Q. Such as what?

A. Say income taxes.

Q. Yes; what else?           A. Interest.

Q. Yes?           A. Franchise taxes.

Q. Yes?           A. That is enough. [901-195]

\* \* \* \* \*

Q. So that in general overhead are contained only such items as you specified a moment ago, namely, interest, income taxes and charges by the State of Delaware?

A. We charge to general overhead items those charges which are not proper charges to production overhead.

Q. Well, that is a generalization, Mr. Yoss. It would be better if we broke it down a little bit. Now, you have broken it down somewhat by telling us some of the items that you include in general overhead. Will you finish your job?

A. I gave you three items, and they constitute the bulk of our general overhead. There may be other items in there.

Q. Of what nature?

A. As I told you, anything that doesn't affect the production of a picture.

Q. Can you think of anything?

A. Not at the moment.

(Deposition of Joseph Charles Yoss.)

Q. Not at the moment.

A. Maybe representation service, for example, in Delaware.

Q. Everything else is contained in your accounts of production overhead?

A. I charge to production overhead those things [901-196] which indirectly affect the cost of pictures. [901-197]

\* \* \* \* \*

Q. Can you tell us how Mr. Bernhard's salary was allocated during the time that he was there; how that was divided, as you call it, or segregated?

A. Half of it was charged to production overhead and the other half was charged to production as a direct cost.

Q. And included in the caption "Producer"?

A. Yes.

Q. In the budget of pictures produced?

A. Yes.

Q. Was any part of Mr. Hyde's salary included as a direct charge to pictures produced?

A. No.

Q. Was any part of Mr. Schwab's fees included?

A. No.

Q. Were they included as a direct charge?

A. No.

Q. Or your salary, Mr. Yoss?

A. No. [901-204]

\* \* \* \* \*

Q. Well, then, what did you say?

A. Our procedure for writing off stories or any

(Deposition of Joseph Charles Yoss.)

other property is that at the end of any given accounting period, each property is reviewed for the purpose of determining if there is any possibility that this story is no longer of value. Such decision is made by Milton Sperling. If he says that this property is not—there is no opportunity that we will use it as a basis for a picture, then it will be charged into overhead. Now, we may make such a review during the month of January, for example, but its effect, however, would be as of the end of the previous year. [901-237]

\* \* \* \* \*

Q. Were you in the habit of submitting invoices to Warner Bros. at the end of each week after December 7, 1946? [901-258]

A. It is a regular procedure.

Q. In other words, every week you gave Warner Bros. a list of monies that you had either paid or expended, that is, incurred or expended, during that week; is that right?

A. That is right.

Q. And you would get a check from Warner Bros. the following week, is that right, or right after you sent this request—

A. Generally your statement is correct.

Q. I beg your pardon?

A. Generally your statement is correct.

\* \* \* \* \* [901-259]



(Deposition of Joseph Charles Yoss.)

Q. Your answer is interesting to me to this extent and I want to interrogate you on the subject: Am I [901-263] to understand that U. S. Pictures would either purchase a literary property or have a literary property written for it and then at some time or another determine for itself whether U. S. Pictures intends to use such property as the basis for an "Original" or an "Additional" picture?

A. We have the right under our contract to designate a picture as an "Original" or an "Additional" as we choose, before we entered principal photography.

Q. Yes, I am aware of that; and it is with respect to that particular portion of your contract that this interrogation is directed. When, between the time that you either purchased or had a story written for you and that way acquired it, and the time you commenced principal photography, when in that interim do you make a decision as to whether a picture is going to be an "Additional" or an "Original" picture?

A. In the past we have made this decision just prior to principal photography commencement.

Q. You mean on the day before?

A. Maybe a few days before; I don't recall.

Q. It may be a few days before. Then what do

(Deposition of Joseph Charles Yoss.)

you do when you decide that this is going to be an "Additional" picture and not an "Original" picture? Just what do you do?

A. I don't understand your question.

Q. Well, in the first place, you have a meeting of [901-264] your Board of Directors, do you, and you make that determination—or does Mr. Sperling make that determination himself?

A. Well, it would be a subject of discussion between us. I don't think there would be a meeting if——

Q. When you say "between us," you mean between whom?

A. Mr. Sperling and Mr. Schwab and myself.

Q. And Mr. Sperling would indicate his views as to whether he wants this an "original" or an "additional" picture; is that right?

A. It would be discussed.

Q. He would make the decision, would he?

A. His would be the final decision.

Q. After he made that decision, what would he do?

A. I would be—I would know of that decision and then I would see that a letter was prepared and Warners notified as to whether it was either "Original" or "Additional."

Q. Have you such letters in your file?

A. Yes.

Q. And in such letters, do you state to Warner Bros. that you intend to commence principal photography on such and such a picture and you design-

(Deposition of Joseph Charles Yoss.)

nite this picture as an "Original" or an "Additional" as the case may be?

A. We indicate to them that we designate the picture either as an "original" or "Additional."

Q. I see. Now, at such time as you make such announcement to Warner Bros., you have assembled, have you not, all of the elements of the picture which you are going to shoot?

A. Generally, yes, or at least we are in the process of it.

Q. Well, you have your director, haven't you, under contract?

A. Presumably so, yes. [901-266]

\* \* \* \* \*

Q. Do you know of any instance in which a director on any picture that you have produced was chosen only a few days before commencement of principal photography?

A. No, sir.

\* \* \* \* \*

Q. (By Mr. Levy): Is there any question but that the [901-268] cast of the picture had been assembled at the time that you made such announcements?

A. Well, the principal cast would obviously be assembled. It is generally the practice all during the picture to pick your minor cast as you go along.

Q. But the principals?

A. Yes, the principals would have been chosen.

Q. And your production manager?

A. Yes.

(Deposition of Joseph Charles Yoss.)

Q. Will you not say that as a general proposition, you had all the elements of the picture assembled which you required in order to commence principal photography when you made that announcement to Warner Bros.?

A. As a general proposition, yes.

Q. And by that time you would have gone through the whole process of entering into numerous contracts with personnel involved in the production of that picture?

A. We would have entered into many contracts.  
\* \* \* \* \* [901-269]

Mr. Levy: Yes. I offer in evidence Exhibit 95-H.

Mr. Williams: The same objection, your Honor.

The Court: Overruled. Received in evidence.

(The document was thereupon marked Plaintiff's Exhibit 95-H and received in evidence.)

\* \* \* \* \*

"United States Pictures, Inc.  
Income Tax Return"

This is the heading on the document that I am reading. The further heading: "Loss on Photoplay My Girl Tisa." And this whole exhibit, by the way, if your Honor please, is denominated Amended Return for Calendar Year 1948 of United States Pictures, Inc. [908]

"Under the terms of an agreement with Warner Bros. Pictures, Inc. dated September 28, 1945, and amended November 2, 1945, December 6, 1947, Feb-

ruary 3, 1948, and July 21, 1950, United States Pictures, Inc. has produced at Warner Bros. studio three 'original' motion pictures and three 'additional' pictures to December 31, 1950.

"With respect to the three original pictures, Warner Bros. Pictures, Inc. financed one-half of the cost of each production and the amounts advanced along with various costs and expenses incurred in distribution have been deducted in full or in part by it from the proceeds of each picture. The first two original pictures, *Cloak and Dagger* and *Pursued*, resulted in profits (receipts in excess of all costs and expenses) which in accordance with the terms of the agreement are being shared equally by the two parties.

"With respect to original pictures, subdivision (j) of paragraph Seventh of the agreement provides as follows:

" 'There shall be paid to the Producer (United) the share of the gross receipts hereinbefore provided from each photoplay as same are earned, provided that if any photoplay shall result in a net loss then the amount of said loss shall be recouped by the Company [909] (Warner Bros. Pictures, Inc.) from the proceeds of any or all subsequent photoplay or photoplays, in addition to the other charges and costs which it is authorized to retain from such subsequent photoplay or photoplays until it has recouped such loss. If, within four (4) years after the first general release in the United States of America of the last photoplay produced hereunder the Company has not recouped all of the



moneys owing to it pursuant to the terms thereof, then the Producer shall pay to the Company the amount of such deficiency.'

"The third original picture, *My Girl Tisa* (released in 1948), will result in a loss which the company estimated in its 1948 return would approximate \$1,200,000, calculated as follows:

Cost of Production, one-half of which was financed by Warner Bros. and is repayable on basis set forth below .....	\$1,645,066.78
---	----------------

Less—Estimated gross receipts re- duced by estimated expenses of distribution .....	442,746.74
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Indicated loss .....	\$1,202,320.04
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In the 1948 return the company deducted amortization of this picture in an amount sufficient to reduce all [910] production costs (financed by both the taxpayer and Warner Bros.) to estimated realizable value and allocated one-half (\$601,660.02) of the estimated loss to Warner Bros. Pictures, Inc. on the assumption that the losses as well as the profits were to be shared equally by the parties to the agreement. However, legal counsel after considering the aforementioned agreement has decided that the taxpayer was not entitled to deduct in its 1948 income tax return any portion of the *Tisa* production costs financed by Warner Bros. Pictures, Inc. because United's liability, if any, to reimburse Warner Bros. for such costs is contingent

and is enforceable only if Warner Bros. has not recouped its loss from the gross receipts of subsequent productions within four years after the general release of the last photoplay to be produced under the agreement.

“In view of the above, amended 1948 and 1949 income tax returns are being filed; these returns and the company’s 1950 return have been prepared to reflect a loss to United of \$403,513.76 on My Girl Tisa, instead of the \$601,660.02 shown in the original 1948 return, computed as follows:”

And on the next page the computation is made.

\* \* \* \* \*

### R. J. OBRINGER

recalled as a witness on behalf of plaintiff, previously sworn, testified further as follows: [916]

\* \* \* \* \*

### Direct Examination—Resumed

Q. (By Mr. Levy): When you were last on the witness stand, Mr. Obringer, I had asked you whether you knew the meaning of the words “general purposes,” which words are contained in the answer to Interrogatory H in Exhibit 107 in evidence, [917] on page 2 of that exhibit. [918]

\* \* \* \* \*

Q. (By Mr. Levy): Mr. Obringer, did you yourself frame the answer, namely, H, that we are referring to?           A. No, sir.

Q. Am I to understand, then, that somebody else authored the answer?

A. That is correct.

Q. Do you know who its author was?

(Testimony of R. J. Obringer.)

A. No, I do not. The interrogatories were presented to me for my signature as an officer of Warner Bros. Pictures, Inc., and the information which I verified was served by various departments in New York and the local studio.

Q. I take it, this was the situation: there was presented to you Exhibit 107 and you thereupon formally [919] affixed your signature thereto as an officer of Warner Bros.?

A. That is true.

\* \* \* \* \*

Q. Mr. Obringer, did you have any information with respect to the dates of release of any of these pictures? And when I use the word "release," I refer to general release in the United States.

A. No, sir, none whatsoever. [920]

Q. You never had that information?

A. That information is a New York detail.

Q. So that, if you made answer in these interrogatories with respect to release dates, that also falls in the category of information that has been supplied to you and which you formally verified; is that correct?           A. That is correct.

Q. You have, then, no independent knowledge of the dates of release of any of these pictures?

A. None whatsoever. [921]

\* \* \* \* \*

Q. (By Mr. Levy): Mr. Obringer, I direct your attention specifically to paragraph 5 which I will read to you.

\* \* \* \* \*

(Testimony of R. J. Obringer.)

The Court: You are referring to Exhibit 4, is it?

Mr. Levy: Exhibit No. 4 in evidence. [929]

\* \* \* \* \*

Mr. Levy: Well, let me read it again. This is a very poor photostat.

"Paragraph 5. You agree that prior to commencement of principal photography of any of the photoplays hereinbefore referred to and about to be produced by you, you will advise us in writing whether the same shall be a remaining original photoplay or an additional photoplay as hereinbefore referred to."

Q. Were you the author of that particular paragraph?

A. I would say that that paragraph was worked out either between myself and Mr. Schwab or Mr. Voss purely from a practical standpoint.

Q. Pardon me?

A. Merely from a practical standpoint, if we were going to do an original picture it involved a different type of financing than it would be if it would be an additional [930] picture, and we had to know what we had to do in advance.

Q. That is the explanation for the inclusion of paragraph 5?

A. That is the purpose of the paragraph; yes, sir.

Q. Was that the sole purpose of it?

A. As far as I know, yes.

\* \* \* \* \*

Q. May I ask you this, Mr. Obringer: At the



(Testimony of R. J. Obringer.)

time that this paragraph was drawn were you familiar with the fact that preproduction of a photoplay might involve the expenditure by Warners or the advance by Warners of large sums of money? When I say "large" I mean sums ranging from \$50,000 to a quarter of a million dollars.

A. With respect to the production of photoplays in general?

Q. Preproduction?            A. Preproduction?

Q. Yes.

A. Yes, I am familiar with that fact and provided for it by the contracts. [931]

\* \* \* \* \*

Q. (By Mr. Levy): Do you know, Mr. Obringer, that in the course of the preparation for production of a photoplay, whether by Warner Bros. Pictures or by an independent producer, a script has to be written?            A. Yes.

Q. Do you know that?

A. Certainly, I do.

Q. Do you know that the thing starts with a story, whether it be a book, short story, novel or stage play—you know that?

A. I am familiar with that phase.

Q. Do you know that occasionally the purchase of such story, stage play, or magazine short story runs into considerable [932] money?

Mr. Williams: Just a moment. If your Honor please, I object to this question on the ground that it has no relevancy to the issues involved in this case what this witness knows of the subject.



(Testimony of R. J. Obringer.)

The Court: Overruled. He may answer.

Q. (By Mr. Levy): Do you know those things?

A. I have reasonable knowledge that those things take place, yes.

\* \* \* \* \*

Q. (By Mr. Levy): Were you aware—put it that way—of the fact that under paragraph 5, United States Pictures had the right to withhold advising Warner Bros. Pictures of whether or not a picture which United States Pictures [933] had been preparing for production, namely, for photography, would be an original or an additional picture up to the very moment that United States Pictures through its directors would step on the sound stages and begin turning the camera; were you aware of that fact?

Mr. Williams: That is objected to as argumentative as to form, and the document speaks for itself.

The Court: Sustained.

Mr. Williams: As to what the rights are.

The Court: You may inquire as to his understanding if you are so advised.

Q. (By Mr. Levy): Did you understand, Mr. Obringer, at the time that this particular paragraph was authored by you that the situation was as I described it in the previous question?

Mr. Williams: That is objected to, if your Honor please, as improper in that it is the question as to which your Honor has already sustained an objection.

(Testimony of R. J. Obringer.)

The Court: Overruled. If the witness understands it. Do you understand the question?

The Witness: No, I do not. Will you repeat it, please?

The Court: I suggest you rephrase it.

Q. (By Mr. Levy): At the time that paragraph 5 was incorporated by you in Exhibit 4 in evidence was it your understanding that United States Pictures had the right to [934] prepare a motion picture, proceeding from its initial stages, namely, the purchase or other acquisition of the material upon which the picture was based, the processing of it through having it written and developed into a scenario, a shooting script, assembling of a cast therefor, the employment of the personnel, directors, stars, etc.—that United States Pictures would have the right—was it your understanding that United States Pictures would have the right to do all of that which I have just described, and incur the expense embraced in such behavior, and not notify Warner Bros. Pictures as to whether the product of all that I have indicated to you would be used by United States Pictures in the production of an original picture or an additional picture? A. Well—

Mr. Williams: If your Honor please, that is a question which is absolutely argumentative in every sense of the word.

The Court: Overruled.

Mr. Williams: It involves an entire series of matters which are not involved in this question at

(Testimony of R. J. Obringer.)

all, and involves a completely different series of clauses in the contracts involved.

The Court: Overruled. You may answer.

A. Well, the details which you have enumerated did not enter my mind as regards the preparation of this paragraph [935] 5. It was purely designed to put us on notice as to whether or not we were to finance 100 per cent or to provide for 50 per cent of the finances. That was the sum and substance of the paragraph.

Q. (By Mr. Levy): I see. And that is the explanation that you have for it? A. That is.

Q. Were you aware of the fact that Warner Bros., in the case of the picture being an additional picture, would have financed all that I have just described to you in the previous question 100 per cent, whereas if the picture were at the last moment denominated by United States Pictures as an original picture, Warner Bros. would be financing only 50 per cent of such costs? Were you aware of that?

A. Yes, I was aware of it, but, to me, it would be immaterial until we came to the point when we commenced financing whether it shall be 50 per cent or 100 per cent.

Q. It was immaterial? A. True. [936]

\* \* \* \* \*

Q. Mr. Obringer, at the time you authored Exhibit No. 4 and particularly paragraph 6 of Exhibit No. 4 were you aware of the fact that United had

(Testimony of R. J. Obringer.)

charged as overhead to the picture Cloak and Dagger the sum of \$116,801.94?

A. No, sir. That information would be an accounting problem and I wouldn't have any knowledge of it.

Q. So that at the time that this document was drawn by you, you had no idea of how much United had theretofore apportioned to its overhead, is that right?

A. That is right. I had no knowledge and it was not within my province. [958]

\* \* \* \* \*

Q. I take it, then—and correct me if I am in error—that at the time Exhibit 7 was executed and prior [961] to the time it was executed you, as an individual, had no knowledge of how much United had theretofore allocated to all of the pictures that it had produced up to that time, in the form of overhead?

A. It was strictly an accounting problem. I had no knowledge whatsoever.

Q. Now, Mr. Obringer, will you take Exhibit No. 107 that is before you and turn to the very last page in that exhibit. It is referred to as "Schedule H." That is, is it not, a further amendment to the basic contract, namely, Exhibit 1?

A. That is correct. [962]

Q. Were you the author of that document?

A. I was.

Q. Namely, Schedule H?                      A. Correct.

Q. Might I ask you whether at the time you

(Testimony of R. J. Obring.)

offered Exhibit 7, being the July 21, 1951, amendment to the master contract, whether you knew that My Girl Tisa had sustained a loss of approximately a million dollars?

Mr. Williams: If your Honor please, that is objected to as assuming facts not in evidence, to wit, that it had sustained such a loss.

Mr. Levy: The evidence, by the admission of the parties, indicates that My Girl Tisa had sustained a loss of a million and two hundred-odd thousand dollars.

Mr. Williams: There is not any question of a loss on My Girl Tisa at that time or at any time. There was a failure up to that time to have recouped the amount of money that was put into the picture.

The Court: Was there a failure of recoupment at that time?

Mr. Williams: There was a failure of recoupment at that time.

The Court: To the extent of a million dollars?

Mr. Williams: I don't think that much at that time. I think it was around eight hundred thousand dollars at [963] that time.

Mr. Levy: Let me reframe the question, then.

Q. At the time you offered Exhibit 7, were you aware of the fact that there had been a failure to recoup approximately \$800,000 on the part of Warner Bros. as the result of the production of that picture?

A. I have no knowledge whatsoever of the prof-



(Testimony of R. J. Obringer.)

its or losses on pictures. I received no such information.

Q. And your answer applies equally, I take it, to Schedule H that is contained on the last page of Exhibit 107?           A. It does.

Q. You had no knowledge at that time whether there had been a failure to recoup on the part of Warner Bros. any amount of money?

A. None whatsoever.

Q. And you similarly had no knowledge of how much United States Pictures had allocated to the production cost of any picture and all pictures that it had produced prior to August 12, 1952?

A. I don't understand your question.

Q. Let me reframe it, then. On August 12, 1952, or immediately prior to that time, when you authored the document which is indicated as Schedule H in Exhibit 107, at that time or at those times you had no knowledge of how much United States [964] Pictures had allocated as United's overhead to the production cost of all pictures theretofore produced, or any picture theretofore produced, by United up to that time?

The Witness: Your prior question did not inform me that the allocation pertained to overhead, but my answer is I absolutely had no knowledge.

Mr. Levy: That is all.

#### Cross Examination

Q. (By Mr. Williams): Mr. Obringer, just a couple of questions with respect to Exhibit 7. I

(Testimony of R. J. Obringer.)

understand that you received your instructions to draw that document from Mr. Sam Schneider.

A. That is correct.

Q. And, after that document had been prepared, you stated the substance of it to Mr. Jack Warner, who approved it?

A. Who approved my signing it as an officer of the corporation.

Q. Did you prepare the document without assistance from anybody else?

A. Yes, I did. Having the facts from Mr. Schneider, this was more or less of a duplication of the previous amendment. [965]

The Court: Does the record show who Mr. Schneider is?

Mr. Williams: Mr. Sam Schneider, a vice president and director of Warner Bros.

Q. That is the Sam Schneider you are referring to? A. Yes.

Q. Who at that time happened to be on the Coast? A. He was in the Coast Studio.

Q. The point I was trying to make was that there was not any negotiation between you and any attorney or other person representing United States Pictures as to the phraseology of that Exhibit 7?

A. No; except to this extent: that Mr. Schneider gave me the details, which were outlined to Mr. Warner, who issued approval for the draft of the document; it was prepared and I recall submitting it to Mr. Schwab, attorney for United, for his acceptance or rejection, and it was accepted.

(Testimony of R. J. Obringer.)

Consequently, the document was executed; copies were disbursed, copies sent on to the trust department in New York.

Q. In Schedule H attached to Exhibit 107, that is the contract of August 12, 1952, from whom did you get your instructions as to writing that contract?

A. I received a telephone call from Mr. Herbert Freston of the law firm of Freston & Files, Warner Bros. [966] West Coast retainers, to the effect that he had had a conversation with an officer of United regarding the preparation of the document to call for two additional pictures, and stated inasmuch as I had theretofore prepared amendments of similar character, he suggested I prepare it, which I did, and submitted it to Mr. Schwab.

Q. Was it accepted without modification, Mr. Obringer?

A. Well, there was some discussion between Mr. Schwab and me on form. I had prepared a draft which paralleled the July 21 agreement by referring to various subdivisions, and Mr. Schwab indicated that perhaps it was a little too verbose in language, and to just reduce the fact to the substance of it, that I had submitted two pictures and extended the term three years.

I thereupon saw no objection to it, and revamped the amendment and sent it over for acceptance by him, which he did, and it was subsequently concluded. \* \* \* \* \* [967]

(Testimony of R. J. Obringer.)

Redirect Examination

Q. (By Mr. Levy): I don't quite remember whether I asked you whether you got Mr. Jack Warner's O.K. on the August 12 Schedule H of Exhibit 107. A. I did, sir. \* \* \* \* \*

Q. And he said, in effect, "O.K., go right ahead"?

A. "It is approved to execute."

\* \* \* \* \* [969]

Mr. Levy: May I, until he returns, your Honor, read a portion of the Statement of J. S. Yoss, who is the accountant for the United States Pictures, into the record.

The Court: A statement or a deposition?

Mr. Levy: It is his statement under oath, and this document was subscribed, sworn to and served upon me pursuant to an agreement had between Mr. Schwab and myself following a motion that had been made before your Honor and came on duly to be heard for an order directing Mr. Yoss to answer questions that he had refused to make answers to during the course of his deposition, and, as a substitute for making answers in accordance to the questions that were propounded to him, he made this statement which we accepted in lieu of his making an answer to each such question.

The Court: It should be offered in evidence, should it not?

Mr. Levy: The reason why I am not offering the whole statement in evidence is because it treats with other matters [980] separate and apart from



the questions that he was asked which were involved in the motion which was brought on before your Honor.

The Court: Let it be marked for identification.

\* \* \* \* \*

The Court: The Yoss statement just referred to will be marked Plaintiff's Exhibit 126 for identification. \* \* \* \* \*

Mr. Williams: If your Honor please, knowing the contents of that statement, which your Honor of course does not know at this time, I wanted to interpose an objection on the ground it is not relevant to the issues now being tried before this court. The statement has to do, if I remember correctly, principally with the two matters: One is the matter of the sale by Mr. Bernhard of his stock to Mr. Sperling, and the other is the matter of the creation of the trust in favor of the children of Mr. and Mrs. Sperling. We cannot concede that that has any relevancy to the issue now before this court. For that reason we object to it on that ground.

The Court: Overruled. [981]

Mr. Levy: Paragraph 10 in Exhibit 126 for identification reads as follows:

"10. Statement of facts concerning loan by Milton Sperling of \$400,000 from the New York Trust Company: The \$40,000 sum referred to on page 50 et seq of the August 13, 1952 session of the J. C. Yoss deposition was borrowed by Milton Sperling from the New York Trust Company on September



16, 1946. Milton Sperling executed a promissory note for said sum dated September 16, 1946. Betty Sperling deposited certain stock, owned by her, of Warner Bros. Pictures with the New York Trust Co. as security for repayment of the loan. Milton Sperling has paid all interest due on said loan since that date. Milton Sperling paid \$100,000 on account of the principal of said loan on or about December 27, 1946, reducing the unpaid balance to \$300,000, which is the present unpaid principal amount of the loan;

11. Statement of facts concerning Title Insurance and Trust Co. trusts: On or about December 23, 1946, Milton Sperling and Betty Sperling, as Trustors, established two trusts with the Title Insurance and Trust Company as Trustee. One of these trusts had as its primary beneficiary Susan Sperling, daughter of Milton and Betty Sperling, and the other trust had as [982] its primary beneficiary Karen Sperling, daughter of Milton and Betty Sperling. The Trustors made gifts to each of said trusts of \$52,700 and 15 shares of United States Pictures stock. Thereafter, and also on December 23, 1946, the Title Insurance and Trust Company, as trustee of each of said trusts, purchased from Milton Sperling 16 shares of stock of United States Pictures, Inc., for each trust, for the sum of \$51,200 for said 16 shares. Each of said trusts accordingly now owns 31 shares of stock of United States Pictures, Inc."

This statement was signed by J. C. Yoss, sub-

scribed and sworn to before Oliver B. Schwab, Notary Public in and for the County of Los Angeles, or in and for said county and State of California, Mr. Schwab?

Mr. Schwab: Oh, yes. \* \* \* \* \* [983]

Mr. Levy: I do not recall, your Honor, whether the deposition of Mr. Yoss stated this fact clearly or not, but if it does not, I believe we could save time, instead of putting the witness on the stand in order to bring this back into the record. It is:

That on the 3rd day of March, 1947 United States Pictures borrowed the sum of \$150,000 from The New York Trust Company. The collateral for that loan was not any of the pictures that are involved in this litigation. The collateral for said loan was the personal guarantee by Harry M. Warner of that note.

If we can have that fact stipulated in the record, I think we can save time, the fact being, namely, on March 3, 1947 United States Pictures borrowed \$150,000 from The New York Trust Company. On that day it made, executed and delivered to The New York Trust Company its note in the sum of \$150,000; that that note was endorsed by Harry M. Warner. [984]

Mr. Williams: We stipulate that those are the facts, but we object to the facts on the ground they do not tend to prove the issue now being tried before this court or any part thereof.

The Court: Overruled. The facts as stipulated are received in evidence.

Mr. Levy: May we have a stipulation as to this further fact, namely, that the note in question was a demand note; further, that United States Pictures has to date paid on account of said note the sum of \$45,000 and that there remains due, owing and unpaid by United States Pictures to The New York Trust Company on said note the sum of \$105,000?

Mr. Williams: We will stipulate that, subject to the objection which we have made, with the further statement that they have paid in addition to the \$45,000 interest on account of that said loan.

Mr. Levy: Very well, sir.

The Court: You make the same objection to the facts so stipulated?

Mr. Williams: The same objection, yes.

The Court: As made to the previous stipulation?

Mr. Williams: Yes, your Honor.

The Court: Objection overruled. The facts as stipulated are received in evidence.

\* \* \* \* \* [985]

The Court: Exhibit C for identification is received in evidence.

(Defendants' Exhibit C for identification was thereupon received in evidence.)

\* \* \* \* \* [992]

Mr. Williams: I will call Mr. Herbert Freston.

HERBERT FRESTON

called as a witness on behalf of defendants, having been duly sworn, testified as follows:

The Clerk: State your name to the court.

The Witness: Herbert Freston.

The Clerk: Will you state your address?

The Witness: 650 South Spring Street, L.A. 14.

Direct Examination

Q. (By Mr. Williams): What is your occupation, Mr. Freston?

A. I am an attorney at law.

Q. How long have you been admitted to practice?

A. This coming July will be 40 years.

Q. You have been practicing during that entire time in what locality?

A. In Los Angeles, with the exception of about two years in the Army Air Force in World War I.

Q. Are you at the present time connected with any law firm? [993]

A. The law firm of Freston & Files.

Q. And you are the Freston of Freston & Files?

A. Correct.

Q. In connection with your work as a lawyer, have you occupied any official positions at the bar?

A. President of the Los Angeles Bar Association, 1940 to 1941; a member of the Board of Governors of the State Bar of California, term expiring in 1947; and Vice President of the State Bar of California.

Q. During the course of your practice have you



(Testimony of Herbert Freston.)

had anything to do with the matter of representing persons or corporations in the motion picture industry?       A. I have.

Q. Beginning at what time?

A. My first contact with the motion picture business, I think, was in 1916, at which time I was in the office of counsel representing Paramount Pictures in this location, or in this locality.

Q. At that time did you perform services in connection with problems arising out of the motion picture industry?

A. I began to at that time, yes, sir.

Q. Have you ever since that time had connection as an attorney with the motion picture industry?       A. Since about 1923, quite actively, yes.

Q. In 1923 what did you undertake in the way of professional work in the motion picture industry?

A. In that year our firm became counsel, West Coast counsel, for Warner Bros. Pictures, Inc.

Q. Has your firm been counsel for that corporation ever since?       A. It has.

Q. Has that work been an active representation of that corporation?

A. Very active.

Q. In the course of that business, have you personally attended to many of the affairs of Warner Bros. Pictures in a legal way?       A. I have.

Q. During that time have you had anything to do with the drawing of the so-called production-distribution contracts?



(Testimony of Herbert Preston.)

A. Yes, I have drawn several, and participated by way of conferences and assistance in the drawing of a number of others.

Q. About what was the date of the first such contract you ever drew?

A. The first one was between Warner Bros. and Cosmopolitan Productions, which was, I think, in 1934 or 1936.

Q. That was the one involving the services of [995] Marion Davies? A. Correct.

Q. Then, at a later time, did you or your firm have something to do with the drawing of this contract which has just been marked in evidence as Defendants' Exhibit A-17-1 to -5, inclusive, that is, the Frank Capra 1940 contract?

A. Yes. Our office drew that contract. The actual dictation, I think was done by Mr. Lewis, but we all conferred with respect to the preparation of it.

Q. Are those the two contracts that you now remember that you personally participated in prior to the matter involved in this case?

A. That's correct.

Q. You have spoken of your firm as being attorneys for Warner Bros. Pictures, Inc. since 1923. Do you in that capacity represent the firm at all places or just on the Pacific Coast, the West Coast?

A. The West Coast.

Q. Does the firm have counsel in New York, who operate at the New York offices and represent them in matters that arise in New York?

(Testimony of Herbert Freston.)

A. Yes; the general counsel's office is in New York City, with whom we are in contact continuously.

Q. In other words, as problems arise, you and they [996] confer with each other concerning those problems? A. That is correct.

Q. Who is the general counsel of Warner Bros. Pictures? A. Mr. Robert W. Perkins.

\* \* \* \* \*

Q. Is Mr. Stanleigh P. Friedman also an attorney for Warner Bros. Pictures, Inc. in New York?

A. Yes, he is.

Q. And Mr. Joseph P. Karp, who is gracing this courtroom with his presence? A. Yes.

Q. He is one of those attorneys, and has been for a number of years?

A. Many years. \* \* \* \* \* [997]

Q. Mr. Roy J. Obringer was with us here. Is he connected with your firm? A. He is not.

Q. What is his capacity with Warner Bros. Pictures, Inc.?

A. He is what we refer to as lot counsel, or resident counsel, at the studio of Warner Bros. Pictures, Inc., in Burbank. \* \* \* \* \*

Q. (By Mr. Williams): Speaking generally, what is the character of matters handled by Mr. Obringer and those handled by your firm?

A. Mr. Obringer is in charge of what we refer to as [998] the contract department at the Studio. He draws contracts of various kinds with talent whose services are used in the pictures. He takes

(Testimony of Herbert Freston.)

care of the exercise of options under contracts, and takes care of notices where notices are called for under contracts. He drafts amendments to those contracts and also sits in as a studio executive with Mr. Jack Warner and others on the lot in the negotiation of contracts. \* \* \* \* \* [999]

Q. I will ask you whether sometime in August of 1945 you had a conversation with Harry M. Warner in respect of a proposed contract between Warner Bros. Pictures, Inc. and United States Pictures?           A. I did.

Q. When and where did that conversation take place?

A. I believe the conversation took place at Mr. Warner's ranch home in the Calabasas area on a Sunday afternoon immediately preceding the drafting of that contract.

Q. Can you fix the date of that conversation?

A. I believe that was on Sunday, August 19, 1945.

Q. What was the substance of what was said by Mr. [1000] Warner to you at that time and what did you say to him on this subject?

A. Mr. Warner told me in substance that he was not a production man; that he was the over-all supervisor of operations of Warner Bros. Pictures, Inc.; that he was very much concerned concerning the health of his brother Jack, who was in charge of production at Warner Bros. Studio.

He told me, as he put it, that Jack had been hauled out of the studio in an ambulance, and that

(Testimony of Herbert Freston.)

the family doctor, Dr. Hirschfeld, had come to Mr. Warner and told him that his brother might be seriously ill, and that since Jack was in charge of production, that he, H. M. Warner, should do something about getting the studio ready to carry on in the event anything happened to Jack.

He also told me at that time that Joe Bernhard, who had been with the Warner organization a number of years, was leaving that company for the purpose of going into independent motion picture production.

He told me that Joe Bernhard had already organized a corporation to engage in that production, and that it was the plan to have Joe Bernhard join with Milton Sperling to form an independent producing unit to produce motion pictures on the Warner lot for distribution through the Warner distributing agency. [1001]

Mr. Warner told me that Sperling, whom I had known since 1932 myself, had had considerable production experience and that he, Warner, had a great deal of confidence in both the ability and integrity of Sperling and he thought it would be an ideal combination to set up such a concern to produce pictures on Warner lot for the purpose of supplying Warner with pictures vitally needed for exhibition in the theatres and for distribution, and, at the same time, as a result of the additional experience which Sperling would attach in that production program, enable him to evolve into a producer of great ability and understanding, to the



(Testimony of Herbert Freston.)

end that if anything should happen to J. L. Warner, Sperling would be able to render his assistance in keeping the Warner production program going.

Warner told me that he had confidence in Sperling, in his honesty and his ability, and that had he been obliged to turn elsewhere now to get some other producer in whom he had confidence, he would not know where to turn.

So he said this corporation would enter into a contract with Warner Bros. Pictures to produce on the Warner lot for Warner distribution——

Mr. Levy: May I interrupt for a moment. By "this corporation" may the witness indicate what he means?

A. It is the corporation, Mr. Levy, that subsequently became known as the United States Pictures, Inc., the [1002] original name being known as the Comet Productions, Inc. which Mr. Bernhard had incorporated himself through his own counsel in New York City, Simpson, Thatcher and Bartlett, I think, did the work.

Now, at that point Mr. Warner asked me to draw that contract. He said, "I would appreciate it if you would take personal charge of it."

At that point I asked him some questions. I said, "First of all, you realize that Sperling is your son-in-law."

He said, "Of course I do. What I want here is simply a contract that is fair both to Warner Bros. and the independent producer. For that reason I have asked you to draw that contract and I am con-



(Testimony of Herbert Freston.)

fident that you will make it a fair and workable arrangement." I said to him—asked him some of the highlights of what the deal was to be. I said, "What is the distribution charge going to be"?

"Well," he said, "that has not been definitely decided yet but I have contacted the New York office and I am told that we could distribute that picture for around 14 or 15 per cent."

I also asked him—— [1003]

\* \* \* \* \*

A. ———what the overhead charge would be on the furnishing of facilities by Warner Bros. to this independent production corporation.

He told me at that the United States Pictures would not use all of the services normally rendered by Warners to an independent producer, since it would be an independent producing unit on its own account, and therefore he was having Price, Waterhouse & Co., certified public accountants, determine on the basis of executions just what the proper overhead would be under this contract—a rate that would be fair to both Warner Bros. and to the producer. He told me also that Price, Waterhouse would put that in letter form and that would simply be a part of the contract.

Q. Was anything said as to the number of pictures proposed to be produced?

A. Yes, I asked him that. He told me that the plan then agreed upon tentatively was to produce six pictures over a period of three years.

(Testimony of Herbert Freston.)

Q. Was anything said as to how the pictures would be financed?

A. At the outset nothing was said about how the [1005] pictures would be financed, except to say that Warner Bros. would furnish a half of the production costs and United States Pictures the other half of the production cost.

Q. What further was said in that conversation?

A. He said that he had had a number of conferences with Mr. Bernhard and that he and Mr. Bernhard had agreed tentatively upon the highlights, some of the principal provisions of this contract. I asked him generally what they were and he said, "Bernhard and I have talked it over. If you will see Bernhard, he will give you the highlights of our agreement."

Q. Was that the substance of that conversation?

A. I think it was. It was a long conversation, Mr. Williams. Many things were said, and I think that is the highlights of it.

Q. That, as you have stated, was on the 19th of—— A. August, 1945.

Q. ——August, 1945. What then did you do with reference to this proposed contract?

A. I went down to the office on the next morning, which was Monday morning, and when I arrived there I found that Mr. Obringer had been to the office on the preceding Friday when I was in San Francisco and had left at the office a draft of a contract which he had prepared, a production-

(Testimony of Herbert Freston.)

distribution contract between Warner Bros. Pictures and Michael Curtiz Productions. That, however, was not a formalized or executed contract, simply a draft that was retained in the process of working out an agreement between Warner Bros. and Michael Curtiz Productions.

That contract I examined very carefully. Also at the time I had before me the Frank Capra Productions contract offered in evidence as Exhibit——

Mr. Williams: That is the one that has been marked A-17-1-5, inclusive. [1007]

\* \* \* \* \*

Mr. Williams: I think you had stated that you had examined it?

A. I did examine that contract very carefully. I also examined carefully at that time the Frank Capra Productions contract in evidence here as No. A-17, Exhibit A-17. The Frank Capra—or, rather, the Michael Curtiz Productions draft that I have referred to appeared to me to be a very suitable form and a form that I was eminently satisfied with so far as its general provisions were concerned. And therefore, in view of the great rush in turning out the first draft of what is now Exhibit No. 1, since it was turned out in just one day, I had recourse to a number of general provisions incorporated in the Michael Curtiz contract which I concluded were most satisfactory to Warner Bros. under this contract. [1008]

Q. Did you have anything else before you when you started to draft this contract?

(Testimony of Herbert Freston.)

A. Yes, I did. I also had before me the summary of the highlights agreed upon, so Mr. Warner said, between him and Mr. Bernhard.

Q. And from what source did you get that?

A. I don't remember where I got that. My impression is that it was handed to me by Mr. Bernhard. It might have been at my office on Monday morning with the other papers Mr. Obringer left. That I cannot recall, Mr. Williams.

Mr. Levy: May I inquire at this time if the witness is referring to a document when he says "a summary"?

The Witness: I am referring to a document, Mr. Levy, which I will be very happy to present.

Q. (By Mr. Williams): Will you state what length of time you took in drafting or making the first draft of this contract which ultimately became the Exhibit No. 1?

A. The first draft of this contract was finished about a quarter of 11:00 p.m. on the night of Monday, August 20, 1945.

Q. And after having completed that first draft what, if anything, did you do with it?

A. I went out to the studio, I believe the next day, and had a conference, I believe with Mr. Obringer, one or both of the Warners, and I do not recall whether Mr. Schwab [1009] was there or not.

Q. Following that did you then make some amendments or changes in the first draft?

A. Yes, I made a number of amendments and



(Testimony of Herbert Freston.)

changes in the first draft, and that first draft as the result of those changes and revisions became the second draft.

Q. At the time that you discussed the first draft with Mr. Bernhard and one or more of the Warners and whoever else was there do you remember what the substance of that discussion was?

A. Well, there were a number of changes made in it. I don't recall just what they were at the moment. However, in preparing that first draft, in view of the uncertainty as to what the distribution charge was, I left the distribution charge blank in that contract. As a result of the conference regarding that first draft, somebody at that conference wrote in the figure of "15"—"15 per cent distribution charge" in the blank space which I had left in that contract.

I came back to the office following that and, as I say, worked on the second draft and I think I finished that late the following night.

Q. What did you do with the second draft?

A. The second draft, I believe I left a copy of it at the Beverly Hills Hotel for Mr. Bernhard so that he [1010] and his counsel, Mr. Schwab, could examine it.

Q. And what did you do following that?

A. Well, following that I had an extended conference with Mr. Schwab in my office a few days after that. The conference was held in our office between Mr. Schwab and me on August 27, 1945. Mr. Schwab wanted a number of changes in that



(Testimony of Herbert Preston.)

contract, some new paragraphs, some additions. We discussed that perhaps an hour or two.

As a result of that negotiation between Mr. Schwab, representing U. S. Pictures, and me on behalf of Warner Bros. Pictures, we agreed on a number of changes in that contract. Some I did not agree to. It was an arm's length negotiation.

\* \* \* \* \*

A. Mr. Schwab was in my office, representing the United States Pictures, and I at the time was representing the Warner Bros. Pictures. I went over the suggestions that he had in mind, which changes and additions, some of which [1011] we argued over for some time, some of which I gave in on, some of which I did not, and it was also agreed at that time with respect to certain clauses that Mr. Schwab wanted, that I agreed to if he himself would draft those suggested clauses and submit them to me in letter form. He did that.

Q. (By Mr. Williams): Are you able to remember at this time, without referring to any notes or memoranda, what the particular points were that were discussed between you and Mr. Schwab?

A. I could not remember all of them without referring to Mr. Schwab's letter and to my notes, but one of them related to the budget. In my first draft I had provided that the budget for the picture was subject to the approval of Warner Bros. Pictures, Inc. Mr. Schwab requested that that clause be so changed as to provide for a budget

(Testimony of Herbert Freston.)

of \$850,000 not subject to approval but subject to Warner's approval if the budget exceeded that sum.

Also Mr. Schwab and I in our discussion, in arguing over the budget provision, considered the matter of Warner Bros. unreasonably withholding its approval of any budget; and also we argued with respect to the right of Warner Bros. to question any single item a part of the budget. He asked that the clause be so changed that Warner should not have the right to object to any single item in the budget, and inasmuch as my clause provided that Warner should have the [1012] right of approval if the budget exceeded \$850,000, that seemed perfectly satisfactory to me and I said, "Okay," and I prepared that accordingly.

\* \* \* \* \*

Q. What was your opinion at that time of the effect of Warner Bros. having the right to approve or disapprove the budget as a whole?

A. I thought that was amply sufficient for Warner Bros.' purposes and would afford full protection to my client, knowing, as I did, that it was a rare exception at that time for any quality picture to be made at a cost of as little as \$850,000. [1013]

\* \* \* \* \*

Q. I think we had reached the point where the question before the witness was whether he would, by the aid of referring to his notes, state what were the points in issue between himself and Mr. Schwab at this conference which they held concerning the

(Testimony of Herbert Freston.)

contract which ultimately became Exhibit 1 in this case.

A. I think I can give you all of those if you wish.

Q. Yes, if you will.

A. I have a sheet in my File 18465 here, marked Exhibit G for identification, all of which is in my own handwriting, marked at the right-hand top "8-27-45 O. B. Schwab and H. F.," referring to Oliver B. Schwab and [1017] Herbert Freston. On that sheet the following items appear:

"Paragraph 4-Budget. No approval necessary unless budget exceeds \$850,000, and if approval required, then as to budget as a whole and not as to separate items. If in excess of \$850,000, company will not be arbitrary or unreasonably withhold approval."

Opposite those two items I have marked: "See J. L. W.," meaning Jack L. Warner. And at the time I made those marks to indicate that those two items Mr. Schwab requested I had to obtain Mr. Warner's approval on.

Q. Did you call Mr. Warner?

A. I did.

Q. What was the conversation between you and Mr. Jack Warner?

A. He said that the clause as I read it to him was satisfactory.

Mr. Levy: That is Jack L. Warner?

The Witness: Jack L. Warner.

Q. (By Mr. Williams): Let me ask you this:

(Testimony of Herbert Freston.)

Why did you call Jack L. Warner rather than Harry Warner in connection with that matter?

A. Because Jack L. Warner is vice-president in charge of production. He has had long experience in the production of motion pictures, and since he is in charge of that activity at the studio and Mr. Harry M. Warner is not and is not a [1018] production man, necessarily I contacted J. L. Warner.

The second item deals with Paragraph 31st. My notes say: "May do outside picture if no default hereunder."

And a further note says: "This is 32 in final draft." Underneath that I have in my own handwriting: "See J. L. Warner."

Q. Did you see Jack L. Warner?

A. I did see J. L. Warner and he did approve of U. S. Pictures making an outside picture at some other studio so long as it was not in default under the provisions of the basic agreement.

Perhaps I had best explain, Mr. Williams, that the final draft of Exhibit 1 included, I think, an additional paragraph which was made in New York before the contract was signed which I did not have in my draft, and that accounts for the changes from 31 to 32, etc.

The next item dealt with material appearing on page 5 of the second draft of this contract which I had prepared. It says: "If producer buys literary property and company pays half of the cost, and if the property is not used by the producer, the pro-



(Testimony of Herbert Preston.)

ducer shall reimburse the company for the company's contribution toward the purchase price."

That provision was discussed between Mr. Schwab and me and was incorporated by me, at my request, in the final draft.

The next item deals with material appearing on page 1 [1019] of Exhibit 1 as it then stood. It says: "50-50 costs of production, but producer may, at its option, require company to contribute less than 50 per cent without otherwise affecting the pay-off, that is to say, 50 per cent to Warner and 50 per cent to producer under the deal." Opposite that item on this page I have these words: "Oliver to draft clause." And that was one of the clauses we agreed that Mr. Schwab would draft, and during that negotiation I had agreed with him that that would be satisfactory for Warner Bros.

Q. Was there anything stated as to the reasons for that clause?

A. Yes. Mr. Schwab said to me that it was quite likely that this enterprise would be successful and that the returns from one or more of the early pictures would come in in such amounts that U. S. Pictures would be in funds and therefore would like the opportunity of using that extra money toward production costs in excess of the 50 per cent. And I also think he explained to me that if U. S. Pictures had created a surplus and did not use it in connection with the production purposes, they might be subject to tax under Section 102 of the Internal Revenue Code, and therefore



(Testimony of Herbert Freston.)

they wanted to do something constructive with their money. I agreed with that problem.

The next memorandum, it says: "Lawsuits. If either [1020] party suffers any losses in re any picture re suits of third persons, defamation, privacy of literary property, etc., any such losses, including legal fees, borne equally by deducting from proceeds. If not sufficient proceeds, then the producer bears the loss."

And the memorandum opposite that provision shows the words: "Oliver to draft."

The next item dealt with the material appearing on page 24 of the second draft. We then had under discussion "re sale of stock. See notes. See J. L. Warner."

That clause, I believe, dealt with the right of U. S. Pictures to sell the stock to some other person, firm or corporation. It was my insistence that no such right be given because of the confidence that Warners had in the U. S. Pictures setup. We wanted to retain that organization and we provided, therefore, that the stock should not be sold except from one of the stockholders to the other.

The next item shows: "Page 1 in paragraph first. Producer may wish to make more than two pictures in any given year."

That was the subject under discussion.

The next item dealt with Section 41½ of Paragraph Seventh, page 14 of the second draft, merely a request to change "production overhead" to "op-

(Testimony of Herbert Freston.)

erating and general overhead." That request was made by Mr. Schwab. I agreed to it. [1021]

\* \* \* \* \*

The next point in my memorandum states, page 5:

"Eliminate on line 5 the word 'necessarily.'"

I agreed with Mr. Schwab that the word "necessarily" might go out.

Q. Will you give us the language so we can understand what that was about?

A. Yes. On the top of page 5, the second draft, Exhibit G for identification:

"The Producer may, from time to time, in preparation for production and during the course of production, incur contractual obligations as an incident to its activities herein provided for, and provided such obligations or commitments are reasonably incurred in connection with such production program."

The word "reasonably" was stricken.

Mr. Levy: At Mr. Schwab's request?

The Witness: At Mr. Schwab's request, and I agreed with that. [1027]

My next item also states:

"Page 5, eliminate four lines, crossed out."

I have actually erased those four lines out of this draft of the second draft, which I actually did, but I may be able to find them for you in the first draft.

I do not have those four lines. They were actually erased by me, but in lieu of those four lines I

(Testimony of Herbert Freston.)

inserted a provision I wanted as a result of our conference and I will read it to you:

“Where the Producer shall enter into contracts with creative or artistic personnel, such as, but not limited to, directors, writers, actors, producers and the like, in connection with the preparation and production of the photoplays herein provided for, the Company will, on proper vouchers and billing from the Producer, pay to the Producer a sum equal to one-half of the moneys payable under such contracts, respectively, weekly, or from time to time, as such moneys become payable.”

I have then inserted the next four lines in my own handwriting in pen and ink, and reading as follows:

“But only for such services as may have been rendered by any such personnel in or in connection with any photoplay to be produced hereunder.”

The reasons for that I can give you, if you wish. [1028]

Q. (By Mr. Williams): What were the reasons for it?

A. The reasons were so the Producer couldn't load the pictures with a lot of talent of its own, and there was the same provision with respect to literary property. They had to be properties bought for use in one of the photoplays, or for artistic personnel employed to render services in one of these pictures.

\* \* \* \* \* [1029]

(Testimony of Herbert Freston.)

The next item shows:

“Paragraph Fifth:”—I have quote marks around this:

“‘In notice required under paragraph Fourth, the Producer will notify the Company as to facilities required by it in production of each photoplay hereunder.’ This goes in and whole of Fifth eliminated.”

Q. (By Mr. Williams): Can you tell us what that particular matter was?

A. Yes. Paragraph Fifth as originally prepared by me and which was eliminated reads as follows:

“The Producer, within blank days prior to the date set for the commencement of production of any photoplay provided to be produced hereunder shall submit a budget of the facilities required for each of such photoplays so to be produced. Since the [1031] Company has agreed to pay one-half of the cost of production of each photoplay provided to be produced hereunder, and in order that it may be advised in advance of expenditure as to the nature and extent of its obligations hereunder, such budget and facilities required for each of said photoplays shall be subject to the approval of the Company, but in this connection the Company agrees that it will not be arbitrary or unreasonably withhold approval of any budget or any item in such budget.”

Mr. Levy: May I ask what page the witness was reading from in the exhibit?



(Testimony of Herbert Freston.)

The Witness: I am reading from page 8 of my second draft, and go over to the first line on page 9.

Mr. Levy: Thank you, sir.

The Witness: And all of that was eliminated as a result of the conference between Mr. Schwab and me, and in lieu of the elimination these words were inserted, or the substance of these words:

“‘In notice required under paragraph Fourth, the Producer will notify the Company as to the facilities required by it in the production of each photoplay hereunder.’ This goes in and whole of Fifth eliminated.”

And this was put in: [1032]

“‘In the notice from the Producer to the Company required under paragraph Fourth hereof, the Producer will notify the Company as to the facilities required by the Producer in connection with the production of each photoplay to be produced hereunder.” [1033]

\* \* \* \* \*

Q. (By Mr. Williams): Let us go back before we proceed with what you did with that after the final draft, let us go back to the subject of where you got the material and information and phraseology for the making of this agreement which ultimately became Exhibit 1 in this case and which, in the form that you have before you, is Exhibit I for identification.

You did, did you not, look to certain material which you had on hand before you to get some of



(Testimony of Herbert Freston.)

the clauses and some of the ideas that are included in this agreement?

A. Yes, I did, many of the clauses which I call more [1041] or less standard clauses.

Q. To what sources did you look for the material and the form and the language that you finally incorporated in this agreement?

A. Some of the clauses and some of the language I took word for word out of the Curtiz draft.

Q. That is Exhibit H?

A. Exhibit H for identification.

Q. Yes. And from what other sources did you get either words or ideas?

A. Some ideas I got from the Bernhard memorandum having the highlights of the points that he and Mr. H. M. Warner had agreed upon with respect to the deal.

Q. That is memorandum that is in the bottom of Exhibit G for identification, is it?

A. Correct. And other paragraphs I wrote out myself or dictated. Many of them I wrote out myself in my own handwriting while the girl was copying the preceding paragraphs, in an effort to get this out in a hurry.

Q. Have you made an analysis of this agreement Exhibit 1 in this case for the purpose of determining the sources from which the various ideas and language which you placed therein were obtained? A. I have.

Q. And have you made notes of that for your own [1042] convenience in testifying?

(Testimony of Herbert Freston.)

A. I have.

Q. Do you have those notes with you?

A. I do.

Q. I presume that, without referring to the notes, it would be rather a long and arduous task for you to undertake to point out the source of each of the paragraphs of the final agreement, would it not?

A. In view of the fact that almost eight years has elapsed since I put this together, I would say that it is a very difficult task, Mr. Williams.

Q. Well, at any rate, by referring to the notes which you have made you can sufficiently refresh your recollection so you can testify as to the source of the matter contained in the agreement, can you not?

A. I believe I can.

Q. Now, with reference to the first paragraph, the introductory language in the first paragraph, what was the source of that language?

Mr. Levy: The first paragraph of what, Mr. Williams?

Mr. Williams: The introductory language in the first paragraph of the agreement Exhibit 1.

The Court: Has a schedule been made, a written schedule of these sources?

Mr. Williams: Yes, your Honor. [1043]

The Court: Does the witness testify that he made it?

The Witness: I made it, your Honor.

The Court: You have, out of court, compared

(Testimony of Herbert Freston.)

the contents of Exhibit 1 with the source material you used in drafting it?

The Witness: That is correct, your Honor.

The Court: You made a list of the sources with reference to the various parts of Exhibit 1?

The Witness: I have.

The Court: Do you have that with you?

The Witness: I do have it with me.

The Court: May it be introduced as the witness' testimony? [1044]

\* \* \* \* \*

The Court: Very well. Then the document that we have been discussing may be received in evidence, and will be received as Defendants' Exhibit J, Mr. Clerk.

The Clerk: J, yes, your Honor.

(The document marked Defendants' Exhibit J, was received in evidence.)

Mr. Levy: Do I understand that I am to receive copies? [1048]

\* \* \* \* \*

(Defendants' Exhibit J in evidence is copied into the record in the following words and figures, to-wit:)

#### Statement re Source Material

Counsel for the plaintiff in this case has submitted to some of the defendants certain detailed interrogatories dated October 28, 1952, and a number of the interrogatories presented make inquiries

## Defendants' Exhibit J—(Continued)

as to the source material of certain provisions appearing in the WBPI-USPI Production-Distribution Agreement of September 28, 1945, hereinafter referred to as the "Basic Agreement." [1049]

As will be observed from the statement of Herbert Freston with reference to the circumstances leading up to the preparation of the basic agreement, the basic agreement in two or three drafts was drawn under great pressure and within a few days from the time the matter was submitted to us. The first draft of the document was turned out in one day until late at night of the same day.

In the nature of things, many of the provisions found in a production-distribution agreement are provisions prepared by counsel as a result of some years of experience in production-distribution set-ups. Many of the basic provisions in the form of production-distribution agreement used in 1945, and indeed being currently used, were formulated in the Legal Department of the New York office of WBPI, and to a great extent agreements prepared out here subsequently have more or less followed that form. Particularly is that so with respect to provisions concerning distribution of motion pictures, since the distribution headquarters is in New York City and the Legal Department there has had considerable contact with distribution matters.

At the time the basic agreement was prepared Herbert Freston had before him a copy of the old agreement drawn in this office between WBPI and



## Defendants' Exhibit J—(Continued)

Frank Capra Productions, which latter agreement was not particularly helpful, but [1050] Herbert Freston also had before him a form of production-distribution agreement, in draft form only, prepared by R. J. Obringer in the Legal Department at the Studio. This was an early draft of a proposed production - distribution agreement between WBPI and Michael Curtiz Productions, which agreement, by the way, had not been placed in final form and had not been executed when the preparation of the basic agreement was commenced. The Michael Curtiz preliminary draft was never executed, but other drafts of that agreement were made and one of the drafts formulated by Mr. Obringer was finally signed by Michael Curtiz Productions and by WBPI, according to recollection, in 1946, and perhaps a year after the basic agreement was prepared. However, the Curtiz draft embodied many provisions which seemed to lend themselves to the arrangement between WBPI and USPI and, therefore, considerable recourse was had to that agreement. Accordingly, the Curtiz draft has been reexamined in connection with the basic agreement and its provisions, and in connection with the interrogatories of October 28, 1952, and a number of the answers given to certain of said interrogatories. This memorandum will endeavor to show what provisions in the basic agreement were taken from or based upon the Curtiz draft, and what provisions, found in the basic agreement, [1051] were drafted by Herbert Freston personally.



## Defendants' Exhibit J—(Continued)

We will start with paragraph Second of the basic agreement:

## Paragraph Second

The first 21 lines of paragraph Second of the basic agreement were taken from paragraph 5 of the Curtiz draft prepared by Obringer.

The last four lines of the first paragraph of paragraph Second of the basic agreement were also taken from the Curtiz draft with slight variations.

The next full paragraph of paragraph Second, commencing with the words "The Company shall keep a record of the cost of all facilities," and ending with the words "the photoplays herein referred to," was drafted by Herbert Freston in his own handwriting when revising the first draft of the basic agreement. (See this handwritten draft in File No. 18465).

The next paragraph of paragraph Second, page 4 of the basic agreement, beginning with the words "The Company shall contribute" and ending with the words "production of a picture," on page 5 of the basic agreement, was taken from a letter from Oliver Schwab dated August 28, 1945, to Herbert Freston, since at a previous conference between Herbert Freston and Schwab it was agreed that he would draft that clause. (See Schwab letter in H.F. [1052] File No. 18465).

The last seven lines of this same paragraph, on page 5 of the basic agreement, beginning with the words "provided, however, in any event," and ending with the words "paragraph Seventh hereof,"

## Defendants' Exhibit J—(Continued)

were drafted by Herbert Freston in his own handwriting, and this handwritten draft is attached to the Schwab letter of August 28, 1945, in File No. 18465.

The next paragraph of paragraph Second, page 5 of the basic agreement, commencing with the words "The Company shall bill the Producer weekly," and ending with the words "as hereinafter provided for," was drafted by Herbert Freston in his own handwriting and this draft so written will be found in H. F. File No. 18465.

The last paragraph on page 5 of the basic agreement was also drafted by H. F. in his own handwriting and typing. (See work sheets in File No. 18465).

The first full paragraph at the top of page 6, down to the 13th line from the top, commencing with the words "one-half thereof," was also drafted by Herbert Freston in his own handwriting, for which see draft in File No. 18565.

(The above provision is referred to by Interrogatory 5—see page 62 of Answers to Interrogatories.) [1053]

The next five lines of this paragraph, beginning with the words "provided, however," and ending with the words "amount so paid," were drafted by Herbert Freston and appear in H. F. handwriting on page 5 of H. F.'s second draft of basic agreement, which in turn was based on suggestions made by Obringer to Herbert Freston.

## Defendants' Exhibit J—(Continued)

(See Interrogatory 47 of Answers to Interrogatories, pages 63-64.)

The next 8 lines in this paragraph commencing with the words "where the Producer" and ending with the words "such moneys become payable" drafted by Herbert Freston. (See draft in H. F. handwriting in File No. 18465.)

Last 3 lines of this paragraph on page 6 of the basic agreement, commencing with the words "but only for" and ending with the words "being produced hereunder" were inserted by H. F. because of a suggestion made by Obringer, and draft of these 3 lines in handwriting of H. F. appears on page 5 of H. F.'s second draft in File No. 18465.

(See Interrogatory 49 and answers appearing on page 65 of Answers to Interrogatories.)

The last 2 lines on page 6, and the first 7 lines [1054] on page 7 of the basic agreement are based in part on Schwab letter to Herbert Freston of 8-28-45. These lines drafted by Herbert Freston. (See rider attached to page 5, H. F. second draft—File No. 18465).

Second paragraph on page 7 of basic agreement, commencing with the words "The Company agrees" and ending with the words "as such employer" drafted by Herbert Freston in own handwriting. (See this draft annexed to first draft of agreement in File No. 18465).

## Paragraph Third

The first full paragraph of paragraph Third,

## Defendants' Exhibit J—(Continued)

page 7, drafted by Herbert Freston. (See H. F. handwritten draft re first draft in File No. 18465).

Second paragraph of paragraph Third, appearing on pages 7 and 8 of the basic agreement, ending with the words "its own photoplays" also drafted by Herbert Freston in handwriting, and is in File No. 18465.

## Paragraph Fourth

The first 10 lines on page 8 of the basic agreement were drafted by Herbert Freston and were based on paragraph 3 of the Memorandum dated August 17, 1945, dictated by Oliver Schwab and handed H. F. by Bernhard. This Memorandum of 8-17-45 will be hereinafter referred to as the "Bernhard Memorandum." For this draft by H. F., see Paragraph Fourth of H. F.'s [1055] first draft in File 18465.

The next 15 lines of paragraph Fourth, pages 8 and 9 of basic agreement, commencing with the words "final budget" and ending with the words "of the Producer" were based on changes made by Herbert Freston in budget provisions appearing in first draft following a conference between H. F. and Schwab on August 27, 1945. The change in budget provision as requested by Schwab was referred to J. L. Warner for his approval. (See H.F. notes on yellow sheet in H.F. handwriting dated "8-25-45—O.B.S. and H.F.—re submission of budget changes to J. L. Warner.")

The paragraph commencing on page 9 of the basic agreement, beginning with the words "since the



## Defendants' Exhibit J—(Continued)

photoplays herein provided" and down to the sixth line from the top of page 10 ending with the words "provisions of this paragraph," drafted by Herbert Freston. (See H.F. yellow sheet covering this paragraph in connection with preparation of first draft).

The last 13 lines of paragraph Fourth on page 10 of the basic agreement were drafted by Herbert Freston. (See handwritten draft annexed to and following end of typed part of paragraph Fourth as shown in H. F.'s second draft in File 18465).

## Paragraph Fifth

There is nothing of any moment in this paragraph found on page 10 of the basic agreement.

## Paragraph Sixth

The whole of paragraph Sixth, page 10, down to and including the seventh line from the top of page 12 of the basic agreement, to and including the word "proper," was substantially taken from paragraph 13 of the Curtiz draft.

The seventh line from the top of page 12 of the basic agreement commencing with the word "provided," and the material included in the next six lines and ending with the words "individual contracts" drafted by Herbert Freston in own handwriting as a result of an agreement reached at a conference between H.F. and Schwab. (See H.F. handwritten memo in File 18465, listing points agreed on in H.F.-Schwab conference).

The last 8 lines of the first paragraph on page 12



## Defendants' Exhibit J—(Continued)

of the basic agreement beginning with the words "The Company agrees" and ending with the words "the same party" are taken from paragraph 18 of the Curtiz draft.

The first 12 lines of the second paragraph on page 12 are, with minor variations, taken from paragraph 13 of the Curtiz draft. [1057]

The material on page 13, basic agreement, third line from the top of that page, commencing with the words "provided, however," to and including the words "of the Producer" in the sixth line from the bottom of paragraph Sixth, page 12, was drafted by Herbert Freston pursuant to paragraph 14 of the Bernhard Memorandum. (See H.F. handwritten draft of this provision attached to end of paragraph Sixth in H.F. first draft, File 18465.)

The last 6 lines of paragraph Sixth, page 12 of the basic agreement were taken from the last 7 lines of paragraph 13 of the Curtiz draft.

## Paragraph Seventh

Paragraph Seventh of the basic agreement was taken from paragraph 12(a) of the Curtiz draft, with the exception of sub-paragraph 4½ appearing on page 15 and 16 of the basic agreement, and with the exception of the words "except the moneys set forth in subdivision 4½ of this paragraph, which moneys the Company shall pay or cause to be paid to the Producer," which appeared in the last two lines on page 13 and in the first line on page 14 of the basic agreement. Also excepting the refer-

## Defendants' Exhibit J—(Continued)

ence to sub-paragraph 4½ in the sixth line from the top of page 14.

(Interrogatory 51, shown in the Answers [1058] to Interrogatories on page 66 is directed to this subparagraph 4½ found on page 15 and 16 of the basic contract.)

Subparagraph 4½ was drafted by Herbert Freston and was based upon paragraph 19-D and paragraph 20 of the Bernhard Memorandum. Paragraphs 19-D and 20 of the Bernhard Memorandum presumably were incorporated in that memorandum by Schwab at the direction of Bernhard as being one of the items that H. M. Warner and Bernhard agreed upon while they were discussing certain provisions which would be included in the basic agreement. H. F. did not raise any question as to whether or not such a provision was agreed upon between Messrs. Warner and Bernhard, but simply drafted clause 4½ of paragraph Seventh (a) because, so far as H. F. was concerned, it was one of the things that Warner and Bernhard had agreed to be incorporated in the basic agreement. (See draft of Section 4½ of paragraph Seventh (a) is in H. F.'s handwriting. See yellow memorandum in file marked "H.F." in file 18465.

Practically all of the provisions of paragraph Seventh (a), including subparagraphs (1) to (1) inclusive, but omitting subparagraph 4½, are more or less standard provisions appearing in the form of distribution contract in common use by WBPI, and, as [1059] above noted, these standard provi-

## Defendants' Exhibit J—(Continued)

sions were included in the Curtiz draft from which Seventh (a) largely was taken.

As above noted, Interrogatory 51, found on page 66 of the Answers to interrogatories, quotes paragraph 41½. Interrogatory 52, on page 66 of the Answers to Interrogatories, asks the question whether any such contract or contracts other than the WBPI-USPI basic agreement, entered into by Warner Bros., contained any provision substantially like or similar to the above-quoted Section 41½.

H. F. knows of no other contract, as finally executed by Warner Bros., which contained a clause similar to Section 41½. However, it should be noted that the Curtiz draft prepared some time in 1945, which H. F. had before him when preparing the basic agreement, in paragraph 14 (a), (IV), page 16, states:

“It is agreed, however, that the actual allocation of general overhead as herein concerned, shall be as determined by Price, Waterhouse & Co., certified Public Accountants, as the proper and fair charge to each photoplay, and shall be no greater than said Price, Waterhouse & Co. determines should be charged to other photoplays produced by Warner of similar type and [1060] comparable cost and importance.”

It should also be noted that this clause was taken from an early draft of the Curtiz contract, but when the Curtiz contract was finally executed by WBPI and by Curtiz Productions, that clause was

## Defendants' Exhibit J—(Continued)

eliminated and a flat 35 per cent overhead rate was inserted instead.

It should also be noted that paragraph 14(a) (IV) of the Curtiz contract provides: The production cost shall further include the general overhead of the Producer as herein defined."

In another part of the contract, the Producer's overhead production costs were fixed at \$10,000 for each picture to be produced by Curtiz under the contract.

The obvious conclusion is that when the final Curtiz contract was negotiated, prior to execution the parties thereto could not agree upon the Price, Waterhouse provision and for that reason a flat overhead rate was provided for.

The last 9 lines of paragraph Seventh (a) found on page 17 of the basic agreement, relating to the Pierce, Waterhouse determination as to what the overhead should be, were drafted by H. F. in own handwriting. See this draft following paragraph Seventh (10) attached to the first draft in File 18465.

Subparagraph (b) of paragraph Seventh, page 18 of basic agreement, was copied from paragraph 14(b) of the Curtiz draft and appears on page 18 of that draft.

Paragraph Seventh (c), pages 18 and 19 of the basic agreement was copied from paragraph 14(c) of the Curtiz draft on pages 18 and 19 thereof.

Paragraph Seventh (d), pages 19 and 20 of basic



## Defendants' Exhibit J—(Continued)

agreement was taken from paragraph 14(d), pages 19 and 20 of the Curtiz draft.

Paragraph Seventh (e), pages 20-21 of basic agreement was taken from paragraph 14(e), pages 20-21 of the Curtiz draft.

Paragraphs Seventh (f), (g), (h) and (i), pages 21 to 23 of the basic agreement were taken from paragraphs 14 (f), (g), (h) and (8), pages 21 to 23 of the Curtiz draft.

Paragraph Seventh (j) of the basic agreement was taken from paragraph 14(j) of the Curtiz draft, pages 23 and 24, with slight variations.

The first 13 lines of Seventh (k), pages 24 and 25 of the basic agreement were based upon paragraph 14 (k) of the Curtiz draft, page 25.

The material in paragraph Seventh (k), pages 25-26 of the basic agreement, commencing with the [1062] words "The Producer furthermore" in the tenth line from the top of page 25 of the basic agreement, to and including the words "commence thereon" on page 26 of the basic agreement, was drafted by Herbert Freston. (See notes of H.F. on this item on pages 23 and 24 of the second draft in File 18465).

## Paragraph Eighth

The whole of paragraph Eighth, pages 26-28 of the basic agreement was taken from paragraph 15, pages 24-26 of the Curtiz draft.

## Paragraph Ninth

That part of paragraph Ninth, page 28 of the



## Defendants' Exhibit J—(Continued)

basic agreement from the beginning thereof down to and including the words "during such period" in the 13th line from the top of page 29 of the basic agreement, was taken from paragraph 17 of the Curtiz draft.

The last 11 lines of paragraph Ninth, page 29 of the basic agreement were drafted by Herbert Freston. (See H.F. handwritten draft pasted on page 27 of the first draft in File 18465.)

## Paragraph Tenth

Paragraph Tenth, page 29 of the basic agreement, down to and including (c) on page 30 of the basic agreement was taken from and in large part based upon paragraph 18 of the Curtiz draft. (See H.F. [1063] notes on this on pages 29-30 of the first draft.)

The last 4 lines on page 30 of the basic agreement down to the middle of page 31, ending with the words "as the case may be" were drafted by Herbert Freston in own handwriting. (See handwritten draft attached to page 29 of second draft in File 18465.)

## Paragraph Eleventh

Paragraph Eleventh, pages 31-2 of the basic agreement, taken in part from paragraph 19, page 32 of the Curtiz draft.

## Paragraph Twelfth

Paragraph Twelfth, page 32 of the basic agreement was taken from paragraph 20, pages 32-3 of

## Defendants' Exhibit J—(Continued)

the Curtiz draft, except the last line of paragraph Twelfth, reading: "and to release any such picture as a photoplay of the Company." This quoted line was added by Herbert Freston. (See first draft for that addition in H.F. handwriting on page 31 of first draft.) [1064]

## Paragraph Thirteenth

Paragraph Thirteenth for the most part, with slight variations, was taken from paragraph 21, pages 33 and 34 of the Curtiz draft.

The middle paragraph on page 33 of the basic agreement was taken from paragraph 21, page 34, of the Curtiz draft, but changed in accordance with the requirements of paragraph 4 of the Bernhard Memorandum.

The last paragraph commencing on page 33 of the basic agreement, with the words "The Producer understands," and ending with the words "with the Company" on page 34 of the basic agreement, was drafted by Herbert Freston in own handwriting. (See handwritten draft affixed to page 33 of the first draft in File 18465.)

The last 2 paragraphs of paragraph Thirteenth on page 34 of the basic agreement were taken from the Curtiz draft, paragraph 21, page 34.

## Paragraph Fourteenth

The paragraph Fourteenth originally drafted by Herbert Freston on pages 34 and 35 of the basic agreement was eliminated from the contract and a

## Defendants' Exhibit J—(Continued)

new paragraph Fourteenth was made a part of the contract in lieu thereof. This new paragraph Fourteenth apparently was drafted by Mr. Obringer and was signed by him on behalf of WBPI and by USPI, is in letter form, and is dated November 7, 1945. [1065] When the basic agreement was re-copied as a whole, in New York, the revised paragraph Fourteenth was copied in as a part of the basic contract and for that reason it appears in the photostatic copy as if it had originally been inserted therein in its present form in the first instance.

## Paragraph Fifteenth

The first paragraph of paragraph Fifteenth of the basic agreement was drafted by Herbert Freston in his own handwriting. The first 13 lines of paragraph Fifteenth, in H.F. handwriting, are attached to paragraph Fifteenth of the second draft.

The remainder of said first paragraph commencing with the words "since the production of the photoplays" and down to and including the words "contracts or agreements" were also drafted by H.F. in his own handwriting, for which see handwritten draft attached to page 38 of the first draft in File 18465.

The last paragraph of paragraph Fifteenth appearing on page 35 of the basic agreement was also dictated and in part redrafted by Herbert Freston in his own handwriting. (See pages 34 of second draft.) The above provisions drafted by H.F. were in turn based upon certain provisions, changed

Defendants' Exhibit J—(Continued)

somewhat, appearing in paragraph 25, pages 38 and 39 of the Curtiz draft. [1066]

Paragraph Sixteenth

This paragraph, with certain modifications, was based upon paragraph 26, page 39, of the Curtiz draft.

Paragraph Seventeenth

Paragraph Seventeenth of the basic agreement, pages 35 and 36, was based in part on paragraph 27, pages 39 and 40, of the Curtiz draft.

Paragraph Eighteenth

Paragraph Eighteenth of the basic agreement was in large part taken from paragraph 28, page 40, of the Curtiz draft.

Paragraph Nineteenth

Paragraph Nineteenth, pages 36-37, of the basic agreement was taken in part from paragraph 29, pages 40-41 of the Curtiz draft.

Paragraph Twentieth

Paragraph Twentieth of the basic agreement was substantially taken from and is based upon paragraph 30, pages 41 and 42 of the Curtiz draft.

Paragraph Twenty-First

Paragraph Twenty-first of the basic agreement was taken from paragraph 31, page 42 of the Curtiz draft.

Paragraph Twenty-Second

Paragraph Twenty-second of the basic agreement



Defendants' Exhibit J—(Continued)  
was taken from paragraph 32, page 42, of the Curtiz draft. [1067]

Paragraph Twenty-Third

Paragraph Twenty-third of the basic agreement was taken from paragraph 33, page 42, of the Curtiz draft.

Paragraph Twenty-Fourth

Paragraph Twenty-fourth, page 39 of the basic agreement, was taken from paragraph 34, pages 42 and 43 of the Curtiz draft.

Paragraph Twenty-Fifth

Paragraph Twenty-fifth of the basic agreement was taken from paragraph 36, page 44 of the Curtiz draft.

Paragraph Twenty-Sixth

Paragraph Twenty-sixth of the basic agreement was taken from paragraph 37, page 44, of the Curtiz draft.

Paragraph Twenty-Seventh

The first full paragraph of Paragraph Twenty-Seventh, page 40 of the basic agreement was taken from or based upon paragraph 39, page 46 of the Curtiz draft.

The second paragraph of paragraph Twenty-Seventh relating to notices which the Producer may desire to give the Company was drafted by Herbert Freston and this clause appears in both the first and second drafts of the basic agreement in File 18465.

Defendants' Exhibit J—(Continued)

Paragraph Twenty-Eighth

Paragraph Twenty-eighth, page 41 of the basic agreement was in part based upon paragraph 40, page 46 of the Curtiz [1068] draft.

Paragraph Twenty-Ninth

Paragraph Twenty-ninth, pages 41 and 42 of the basic agreement was taken from paragraph 41, pages 46 and 47 of the Curtiz draft.

Paragraph Thirtieth

Paragraph Thirtieth of the basic agreement from the beginning thereof on page 42 to and including the words "distribution charges" on page 43, was taken in part from and was based upon paragraph 42, page 47 of the Curtiz draft.

The last paragraph of paragraph Thirtieth of the basic agreement, page 43, commencing with the words "if either the Company" and ending with the words "action or proceeding" was drafted by Schwab as a result of the conference between H.F. and Schwab held on October 27, 1945, and the material in said paragraph appears on pages 1 and 2 of Mr. Schwab's letter to H. F. dated August 28, 1945, in file 18465.

Paragraph Thirty-First

The first and second drafts of the basic agreement were prepared by Herbert Freston before he was advised that USPI intended to procure a loan from a bank from the purpose of financing its 50

## Defendants' Exhibit J—(Continued)

per cent of the production costs of each picture. Theretofore H.F. had assumed, without knowing, that USPI would provide its own production costs. [1069] For instance, paragraph 9 of the Bernhard Memorandum states:

“Fifty per cent or such lesser sum as U.S. Pictures may require of the total negative costs of each of the pictures is to be lent by Warner Bros. to U.S. Pictures. The balance of production funds to be provided by U.S. Pictures.”

However, when the second draft of the contract was completed, in draft form for the purpose of submitting the draft to Mr. Bernhard and Mr. Schwab, H.F. was advised that arrangements have been made by Mr. Bernhard to borrow USPI's share of the production costs from a New York bank. Accordingly, after the second yellow paper draft had been completed in full, H.F. drafted a new paragraph and numbered it “Thirty-first.” This required the remaining paragraphs of the second yellow paper draft, from paragraph Thirty-second to Thirty-fifth, to be renumbered. Thus, paragraph Thirty-second became paragraph Thirty-third, and so on, ending the second draft with paragraph Thirty-sixth. Therefore, paragraph Thirty-first was drafted by Herbert Freston, and certain changes were made in said draft in the handwriting of Herbert Freston as shown on the draft of paragraph Thirty-first in the yellow paper second draft of the basic agreement in File 18465.

Said draft of paragraph Thirty-first, as [1070]

## Defendants' Exhibit J—(Continued)

prepared by Herbert Freston, was incorporated in the final basic agreement as paragraph Thirty-first.

On November 8, 1945, long after H.F.'s work on the basic agreement was completed, he received a letter dated November 6, 1945, from Stanleigh P. Friedman, New York. In that letter Mr. Friedman told H.F. that Friedman had closed a loan for USPI from the New York Trust Company for the purpose of supplying USPI's share of the production costs. In the course of his letter to H.F., Mr. Friedman stated:

"In the course of agreeing upon the language of the various documents required, it seemed advisable for us to change the language of Section Thirty-first of the Basic Agreement. That clause of Section Thirty-first in which Warner Bros. agrees to subordinate its claim for cash and facilities advanced by it to the bank's claim for priority in the repayment of moneys advanced by the bank, seemed to us to come very close to contravening the inhibition in the Warner \$37,000,000 bank loan agreement. The reasoning is as follows:

"The Warner bank loan agreement (2) (a) provides that Warner will not permit a [1071] lien or encumbrance upon any account receivable; to subordinate its account receivable from United States Pictures to the prior payment of the Bank's loan is almost equivalent to permitting an encumbrance upon Warner's account receivable. In view of the foregoing, United States Pictures, with the consent of The New York Trust Company, entered



## Defendants' Exhibit J—(Continued)

into a Letter Agreement of November 2, 1945, amending the Basic Agreement of September 28, 1945 (this is the new date of this agreement) a copy of which is enclosed herewith. The Letter Agreement revises the language of the one paragraph in Section Thirty-first so as to make it benign in the light of the \$37,000,000 bank loan agreement.

“In order that you may guide yourself as to the inhibitory clauses of the bank loan agreement, I am enclosing herewith a copy for your files.”

The Letter Agreement referred to by Mr. Friedman in his letter amended paragraph Thirty-first of the basic agreement as prepared by H. F., said Letter Agreement being as follows:

“November 2, 1945. [1072]

“Warner Bros. Pictures, Inc.,  
New York, N.Y.

Dear Sirs:

Referring to the agreement between us dated September 28, 1945, it is agreed that the next to the last paragraph of paragraph Thirty-first shall be amended to read as follows:

‘If said bank loan shall be made, as aforesaid, in connection with any photoplay, then in order that said bank may be reimbursed for the amount of its loan, principal and interest, in accordance with the foregoing, the Company agrees that the Producer or its assignee will be entitled to receive all of the gross receipts of such photoplay less distribution

## Defendants' Exhibit J—(Continued)

fees and expenses until Producer or its assignee has received the amount of the bank loan with interest thereon pertaining to such photoplay and the Company agrees that until such time it will pay such balance of the gross receipts of the bank in liquidation of such loan. The distribution fees and expenses which shall be deducted as just set forth shall be those specified in subdivisions (1), (2), (3), (5), (6), (7) and (8) [1073] of said paragraph Seventh (a) and as set forth in subdivision (a) to (e) inclusive of paragraph Seventeenth hereof.'

Very truly yours,

United States Pictures, Inc.

By Jos. Bernhard, President

Agreed to: Warner Bros. Pictures, Inc. By Stanleigh P. Friedman, Vice-President.

Consented to: The New York Trust Company, By Willis McDonald, Vice-President."

At the time H. F. prepared paragraph Thirty-first of the basic agreement he did not know of the loan agreement which WBPI had with the New York banks and, of course, not having seen the agreement, he did not know that there was any provision in that agreement prohibiting Warner Bros. from placing any lien or encumbrance upon any of its accounts receivable or of subordinating its accounts receivable until the New York bank had been repaid the amount of its loan. Had he

## Defendants' Exhibit J—(Continued)

known that at the time, H.F. would, of course, not have prepared paragraph Thirty-first in the manner he did. In any event, paragraph Thirty-first was amended in New York as shown above, and this eliminated any possible violation of the Warner Loan Agreement with the New York bank.

H.F. understands that plaintiff's counsel endeavored to make some point of the fact that paragraph Thirty-first may have contravened the provisions of the Warner Loan Agreement with the New York Bank. H.S. was informed—the source of the information not being presently recalled,—that Messrs. White and Case of New York represented the New York Trust Company in bringing about this amendment to paragraph Thirty-first, and that afterward Messrs. White and Case expressed the opinion that Paragraph Thirty-first of the basic agreement, as amended, did not violate the Warner Loan Agreement with the New York banks.

## Paragraph Thirty-Second

Paragraph Thirty-second, page 47 of the basic agreement was drafted by Herbert Freston and was based upon paragraph 21 of the Bernhard Memorandum. Schwab said USPI would like to have the right to do an outside picture so long as it was not in default under the basic agreement. This request was submitted to J. L. Warner by H.F. for approval, and upon his approval being given was written into the final draft. [1075]

Defendants' Exhibit J—(Continued)

Paragraph Thirty-Third

Paragraph Thirty-third, page 47 of the basic agreement was taken from paragraph 44, page 48 of the Curtiz draft.

Paragraph Thirty-Fourth

Paragraph Thirty-fourth, page 47 of the basic agreement was taken from paragraph 45, page 48 of the Curtiz draft.

Paragraph Thirty-Fifth

Paragraph Thirty-fifth of the basic agreement, page 47, was taken from paragraph 46, page 48 of the Curtiz draft.

Paragraph Thirty-Sixth

Paragraph Thirty-sixth of the basic agreement was inserted in the agreement in New York when the basic agreement was rewritten. This paragraph simply made the agreement effective on and after November 7, 1945.

Paragraph Thirty-Seventh

Paragraph Thirty-seventh, pages 47 and 48 of the basic agreement—which was paragraph Thirty-sixth in H. F.'s final draft—was based upon paragraph 47, page 48, of the Curtiz draft.

Schedule A to the contract was simply copied from a form submitted by the New York office, which same form was annexed to the Curtiz draft as Exhibit B. This was a standard schedule supplied by counsel of the office of [1076] distributor in New York.

Exhibit or Schedule B to the basic contract was



## Defendants' Exhibit J—(Continued)

the letter from Price, Waterhouse & Co. establishing the overhead charge to USPI for the furnishing by WPBI of production facilities.

H.F. does not recall ever seeing the Price, Waterhouse letter, Schedule B to the basic agreement, until after the contract was fully prepared by H.F. in final form.

On page 17 of the basic agreement, H.F. simply included a provision in his own handwriting to the effect that the Price, Waterhouse letter should be attached to the agreement as Schedule B. [1077]

\* \* \* \* \*

Q. Now, we will then proceed to another subject. Having completed what you regarded as the final draft of what is now Exhibit No. 1, what did you next do with that draft?

A. Well, in the interim I had several more conferences, I think with one of the Warners or perhaps both of them, I think perhaps with Mr. Schwab, perhaps with Mr. Bernhard. I have notes on all of this showing to whom I talked and when and where. And after the agreement was finally finished in the form that I have it here, referring to Exhibit I for identification, I took that out to the studio, where I had a conference with H. M. and J. L. Warner for about two hours.

Q. And what was the substance of that conference?

A. I went over this agreement from beginning to end with them, both of them. During the course—I did not read it all. Some clauses I read. I ex-

(Testimony of Herbert Freston.)

plained to each of them what the clauses meant, what they said in a general way, and during the course of that explanation both of them asked me a number of questions about it. I endeavored to answer those questions. And that was on the 30th of August, 1945.

Q. Was there any other person present at that time?

A. I don't remember whether there were or not, but my offhand recollection is that both Warners were there, maybe Bernhard was there. I can tell by looking at my documents.

Q. Will you look at your documents and tell me, Mr. Freston, what documents are you now looking at?

A. These are my personal office time sheets covering the time spent by me on all phases of the preparation of this agreement and its explanation to the clients. [1079]

\* \* \* \* \*

Q. By referring to those will you tell us who were present at these conferences?

A. You mean in the August 30th conference?

Q. Well, whatever the conferences that involved the consideration of this agreement after you got it in draft form.

A. All right. On the 21st of August, which was the day after I completed the first draft of this document, I was enroute to and at the studio from 3:15 until a quarter of 6:00 that night. And at the studio, my notes say—and I verily believe they are

(Testimony of Herbert Freston.)

correct—I talked with H. M. Warner, J. M. Bernhard and Milton Sperling about this agreement and the terms of it.

On the 22nd of August I was engaged in revising that agreement from a quarter of 10:00 in the morning until 11:15 that night.

On the 22nd of August I was again engaged in revising [1080] the agreement.

On the 24th of August I was working on the agreement yet, and on the 24th of August at between 1:30 and 5:00 o'clock I was at the studio for a conference with H. M. Warner, J. L. Warner, Joe Bernhard, Milton Sperling, and Oliver Schwab with reference to this contract.

On the 27th of August from 1:15 to 3:00 o'clock I had a conference in our office with Mr. Oliver Schwab.

Q. That is the conference to which you have already testified?

A. To which I have referred heretofore. Also I see I spent an hour and a half in the morning on that day working on this agreement.

On the 28th of August my record shows I only spent 15 minutes in looking over certain changes in the agreement.

On the 29th of August I worked about three hours on it for some reason or other.

On the 30th day of August from 12:00 to 1:00 o'clock, my notes show reading the agreement, etc., in preparation for a trip to the studio to see J. L. Warner and Joe Bernhard. My notes show also that

(Testimony of Herbert Freston.)

from 1:15 until 4:30 I was enroute to and at the studio for conferences with H. M. Warner, J. L. Warner, Joe Bernhard, Obringer, and Schwab with reference to the agreement. Now, I cannot recall at this time whether Mr. Obringer or Mr. Schwab were there, but nevertheless, it [1081] was my understanding that I was going there to see them.

On the 31st of August, which was the day following the final conference I had at the studio with the brothers Warner, my time sheet shows that I spent 30 minutes only in making changes in my file copy of the agreement, and there was one change that was made in the agreement on August 30th at the final conference I had with the brothers Warner that was more than a mere typographical change.

Q. What was that change?

A. And that was the change of the distribution charge set forth in subdivision (1) of the paragraph Seventh (a) from 15 per cent to 20 per cent. I did not rewrite the contract for the purpose of showing that change in typing, but I merely interlineated above, struck out the word "f-i-f-t-e-e-n", and had my secretary type the word "t-w-e-n-t-y," struck out the figures "15 per cent" and had my secretary insert above that the typewritten numbers "20 per cent." And that is the change—that is one of the changes that were made as the result of the conference with the brothers Warner on the 30th of August, 1945. [1082]

\* \* \* \* \*

Q. What is the practice of banks with reference



(Testimony of Herbert Freston.)

to the matter of security required and the time and manner of repayment of loans to independent producers?      A. It is the normal——

Mr. Levy: Just a moment.

The Witness: Pardon me.

Mr. Levy: I object to the question as to the practice of banks generally. I don't see that it has any relevancy on the issue we are trying here, the practice of banks.

If counsel were to confine the question to bring it right close home, does this situation, namely, the transaction that was involved here between the New York Trust Company and Warner, if the question were directed to what the demands of the New York Trust Company were with respect to this particular transaction, the question would not be objectionable.

The Court: Is the purpose of it to show the witness' understanding at the time he drafted the agreement? [1084]

Mr. Williams: The purpose is to show the witness' understanding at the time he drafted the agreement.

The Court: Why don't you pass the question in that form instead of attempting to prove the fact?

Mr. Williams: I thought I had, if your Honor please; but, in addition to that, I also will want to prove the fact with reference to the practice of banks, because the issue in this case has been raised that this matter of subordinating the Warner Bros.' right to get money to that of the bank was a very

(Testimony of Herbert Freston.)

terrible thing for the benefit of Harry Warner's son-in-law.

It is my purpose to prove there has never been, so far as this witness and many others I am prepared to call, there has never been a case in which a bank ever did lend any money in which it did not require the deposit of the negative and require that this money should come first after the distribution fee and expenses.

In other words, to show that that was a settled practice. [1085]

\* \* \* \* \*

Q. Do you know, Mr. Freston, whether at the time you drafted what is now Exhibit 1 in this case, whether there was at that time a practice of banks in reference to the security required and the terms of repayment of loans made to independent producers? A. I do.

Q. You were aware of that at that time?

A. I was. [1086]

The Court: Very well. The question is what you understood those requirements to be at the time you drafted Exhibit 1, as I understand it.

The Witness: That is correct. The bank would generally want to see that a proper commitment had been made to distribute the picture. That is one of the first requisites.

The Court: A reliable distributor?

The Witness: A reliable distributor.

The bank then would insist as a condition precedent to its loan that the negative and prints gen-

(Testimony of Herbert Freston.)

erally be pledged or hypothecated for the benefit of securing the bank in the repayment of the amount of its loan with interest.

The Court: Would that include the mortgage of the copyright?

The Witness: I don't recall whether the pledge agreement goes so far as to cover the copyright or not, [1092] but they do do it. We have one in the Capra situation which would show that.

The bank also insists, and this is a very common requirement, that where an independent producer makes a picture on a major lot for major distribution, that there shall be an unconditional guarantee of completion of that picture by the major producer.

The banks also insist that the money payable to the bank or the money coming to the bank in repayment of its loan, principal and interest, shall come out first.

The Court: That is, out of the first proceeds of distribution?

The Witness: That is correct; out of the first proceeds of distribution, with the sole exception only of the distribution costs and things of that sort which enables a distributor to distribute, but the next money goes to the bank until the bank is repaid in full, principal and interest. [1093]

\* \* \* \* \*

The Court: Do you have any knowledge as to the requirements of New York banks?

The Witness: I have no knowledge as to the

(Testimony of Herbert Freston.)

[1094] requirements of New York banks except the knowledge that I have obtained from this very deal, I might say to your Honor. [1095]

\* \* \* \* \*

Q. (By Mr. Williams): Mr. Freston, at the time you drew this agreement, Exhibit 1, without going into any specific details, did you have the intention at that time of making an agreement which would be especially for the benefit of Mr. Sperling, and to the same extent unfair to Warner Bros. Pictures, Inc.? [1099]

\* \* \* \* \*

A. It was my intention to draw an agreement that was perfectly fair to my own client as well as to United States Pictures. In paragraph 31 I simply made out the common program that has been used in banking loans for many years. It doesn't favor one or the other. The bank is the only one that is favored, really.

\* \* \* \* \*

Q. (By Mr. Williams): The question I asked, which I think probably I did not make clear enough, I was referring to paragraph 31 specifically, and I was referring to the entire agreement, Exhibit 1 in this case, and I ask you whether at the time you were drafting this agreement you had the intention to draft an agreement which [1100] would specially favor Mr. Sperling or United States Pictures, or either of them, and to the same extent would be detrimental to Warner Bros. Pictures, Inc.?



(Testimony of Herbert Freston.)

A. I had no such intention, Mr. Williams.

\* \* \* \* \*

Q. Was it your intention in drafting this agreement, and in the drafting of it, to make an agreement which would fairly protect the interests and safeguard the rights of Warner Bros. Pictures, Inc.?

A. That was my intention. [1101]

\* \* \* \* \*

Q. Did any person who discussed the matter of this agreement with you while you were drafting it or at any time in connection with the drafting of it make any statement to you which you understood to be a request or suggestion that you should unduly favor United States Pictures or Milton Sperling to the detriment of Warner Bros. in connection with this deal?

A. Nobody made any such statement, Mr. Williams, at any time.

I might say to you this agreement is largely my own idea. [1103] I put it the way I thought it should be. [1104]

\* \* \* \* \*

Q. (By Mr. Williams): Was there any act, verbal or otherwise, or anything done or said by any person in connection with this matter, which you understood to be a request or an intention or a suggestion that you should favor Milton Sperling to any extent, or United States Pictures to any extent, in the matter of drafting this agreement?

A. Nothing was said by anybody on any phase of any such situation at any time.

(Testimony of Herbert Freston.)

The Court: Do you mean that your answer is "No"?

The Witness: I mean that my answer is "No," your Honor. I find it difficult to explain this, but, as a matter [1105] of fact, I constructed this agreement myself. Nobody told me what to put in it——

\* \* \* \* \*

Q. (By Mr. Williams): Mr. Freston, what information did you have during the time you were drafting this contract as to what, if anything, had been decided by anybody with reference to the salaries of Milton Sperling and Joseph Bernhard?

A. I was told what they were by H. M. Warner.

Q. And what were you told?

A. I was told they were to be \$1,000 a week, which he had approved.

The Court: Did you understand that to mean that Sperling—and who is the other man?

The Witness: Bernhard. [1111]

The Court: —and Bernhard had agreed between them that they would have a salary each of \$1,000 a week, and that H. M. Warner had approved that arrangement?

The Witness: That is what I understood, that it was an approval all around, that it was an agreement all around that their salaries would be that amount.

Mr. Levy: May we have the date of that discussion?

The Witness: Well, Mr. Levy, it is somewhere between August 21 and August 30 of 1945.

(Testimony of Herbert Freston.)

Mr. Levy: Yes, sir.

Q. (By Mr. Williams): And was it at one of these conversations that you have already testified that you had with H. M. Warner?

A. Yes. [1112]

\* \* \* \* \*

The Court: It calls for "belief." Sustained. Do you mean to inquire whether, according to this witness' understanding at the time he drafted Exhibit 1, it was anything unusual for a company such as Warner Bros. to enter into such an arrangement as this with an independent producer of such limited capital?

Mr. Williams: Yes.

The Court: Is there objection to the question in that form?

Mr. Levy: If the question is asked in that form, I have no objection to it.

Mr. Williams: May I adopt that question as my question, your Honor?

The Court: You may if the witness understands it.

The Witness: Would you read it, please, Mr. Bargion?

(Question read by the reporter.) [1116]

A. It was not unusual, your Honor. It was the customary thing.

The Court: That was your understanding at the time?

The Witness: That was my understanding and it always has been. \* \* \* \* \* [1117]

STANLEIGH P. FRIEDMAN

called as a witness on behalf of defendants, having been duly sworn, testified as follows:

The Clerk: Will you state your name to the court?

The Witness: Stanleigh P. Friedman, S-t-a-n-l-e-i-g-h P. F-r-i-e-d-m-a-n.

The Clerk: Your address?

The Witness: 321 West 44th Street, New York City, New York.

Direct Examination

Q. (By Mr. Williams): Mr. Friedman, what is your occupation? A. I am a lawyer.

Q. How long have you been a lawyer?

A. I was admitted to the bar of New York in 1907.

Q. Have you been practicing in New York since that time?

A. No; I graduated from Harvard Law School and have practiced continuously from then until the present time. [1125]

Q. Your offices are in New York City?

A. Correct.

Q. To what courts are you admitted to practice?

A. The United States Supreme Court, the courts of New York, the United States District Court, the Circuit Court of Appeals for the Second Circuit, and your Ninth Circuit Court of Appeals.

Mr. Williams: I wanted to bring out the Ninth Circuit Court of Appeals, your Honor, so that he is not completely a foreigner. I think, if I may, I



(Testimony of Stanleigh P. Friedman.)

ought to, in fixing the qualifications of this witness, call attention to the fact that he is the author of the famous Downfield, the fighting son of Yale University, and three others of the athletic songs regularly played. I am sure that will assist the court in appraising his qualifications.

The Witness: A good musician among lawyers and a good lawyer among musicians.

Q. Mr. Friedman, you are one of the attorneys for Warner Bros. Pictures, Inc.? A. Yes.

Q. How long have you been an attorney for that corporation?

A. Since its inception in April, 1923.

Q. As a matter of fact, you organized the corporation, did you not, you and your partners?

A. My firm, Thomas & Friedman.

Q. Are you a director of Warner Bros.?

A. Yes, sir.

Q. How long have you been a director of Warner Bros.? A. 1930 to date.

Q. In addition to that, do you occupy any office in the company? A. I am vice president.

Q. How long have you been a vice president of Warner Bros.?

A. 1935 or 1936. Since 1935 or 1936.

Q. Where do you make your headquarters with reference to the offices of the company?

A. 321 West 44th Street, New York City.

Q. That is in the same building?

A. In the Warner Building.

(Testimony of Stanleigh P. Friedman.)

Q. Do you devote substantially all of your time to the affairs of Warner Bros. Pictures, Inc.?

A. Yes.

Q. In addition to yourself, what are the other lawyers in New York who represent the company?

A. Our general counsel is Robert W. Perkins. We have six or seven other members of the legal department.

Q. What particular branch of the work do you specialize in? [1127]

A. I have charge of all taxes, federal, state and city and foreign taxes. I have reasonable charge of the litigating department on litigated matters, with the exception of antitrust matters. I have much to do with all the banking arrangements which Warners have had with various banks since the inception of the company. I have much to do with SEC, the Securities and Exchange Commission transactions, and with other corporate activities as such.

Q. In the normal course of your business, do you yourself have anything to do with the drafting or the passing on of contracts of independent producers with Warner Bros. Pictures?

A. No.

Q. Who in Warner Bros. usually takes care of that?

A. Mr. Bareford; Harold Bareford; who, with Mr. Perkins have most to do with these contracts of distribution, and I might add Mr. Ebenstein; contracts where there are independent producers or

(Testimony of Stanleigh P. Friedman.)

in which actors have a share of the profits, but it is beyond the general ambit of my duties.

Q. In the fall of 1945, that is, in the months of August and September, was Mr. Bareford available at the New York offices?

A. No; Mr. Bareford was in the service of his country. [1128]

Q. During that period did you receive from the Burbank Studios a draft of a contract between United States Pictures and Warner Bros. Pictures, Inc.?

A. I did.

Q. You are familiar with the document which has been marked as Plaintiff's Exhibit 1 in this case, are you not?

A. Yes.

Q. Was the document which you received at that time substantially what that Plaintiff's Exhibit 1 now is?

A. Yes.

Q. At the time you received it, what did you do with it?

A. I personally made a thorough analysis of it, which was so long that my friends made fun of me because the analysis was almost as long as the contract itself.

Q. In other words, you made a written analysis?

A. I made a written analysis of every paragraph.

Q. In the course of going over that contract, did you arrange for any changes to be made in it, or suggest any changes in it?

A. I did, a couple of changes, after talking it over with Mr. Perkins and having checked on it

(Testimony of Stanleigh P. Friedman.)

in other ways. I made some minor corrections, and one of them is the correction that Mr. Freston adverted to about the paragraph, I think it is the one toward the end where the [1129] contract was not to begin its operation until November 7, 1945.

I also made a change in the paragraph having to do with the production of pictures outside the studio, for outside distribution, and I think the original contract shows interlineation in my handwriting, but it is entirely inconsequential.

Q. Was the contract then typed up for signature in New York?           A. It was.

Q. In connection with going over this contract, did you discuss the contract or its terms with any of the other people then at Warner in New York?

A. I discussed it with Mr. Perkins. I discussed it with Mr. Schneider, who was then at the coast, by long distance telephone.

Q. Do you remember what phase or phases of the contract you discussed with Mr. Schneider?

A. I asked about certain questions with which I was somewhat unfamiliar, namely, the amount of distribution expense, distribution allowance, particularly, and my memory doesn't serve me accurately as to whether there were any other matters in that contract, any other paragraphs or provisions in that contract as to which I had any doubt, but I did have some doubt about that provision, [1130] because I was unfamiliar with the terms for distribution allowance.



(Testimony of Stanleigh P. Friedman.)

Q. Do you remember the substance of the conversation you had with Mr. Schneider?

A. Yes. I vaguely remember that I asked him if 20 per cent was the usual allowance. I had heard of another contract where the distribution allowance was 17½ per cent and I had thought that perhaps this was a little high. I wanted to make sure that it was correct.

I was told by Mr. Schneider that it was.

Q. Did you discuss the terms of the contract with anybody else that you now remember besides Mr. Schneider and Mr. Perkins?

A. Yes, I had a telephone conversation with Mr. Freston about it, but I have forgotten on what subject.

Q. You don't remember, then, having discussed it with anybody besides these three men you have mentioned at that time?

A. I discussed it with Major Albert Warner in order to acquaint him with some of the details of the contract, because he was the one to present it at the meeting of the board of directors where it was to be submitted for consideration.

Q. Were you present at the meeting when the contract [1131] was submitted for consideration?

A. Yes.

Q. What happened at that meeting, so far as this contract is concerned?

A. Mr. Warner, Albert Warner, who presided at the meeting, and usually presides at the meetings in New York, stated at that time, at the time

(Testimony of Stanleigh P. Friedman.)

of the meeting, we had before us a resignation of Mr. Joseph Bernhard as a director and vice president.

He told us at that time, which was the fact, that we were in the process of drafting an agreement with a company which Bernhard had formed, and which was to include Mr. Sperling, and that this agreement would provide for the production of pictures by an independent group, namely, Sperling and Bernhard and their corporation for distribution by Warner Bros. Pictures.

Then the meeting simply proceeded to the consideration of the resignation and the question of the severance pay for one or two of the men who had withdrawn from the company at that time, including Mr. Bernhard.

Q. Do you remember the name of the other person for whom severance pay was provided at that time?

A. I think it was Charles Einfeld, who was then head of our publicity department.

Mr. Levy: May I have the question read by the [1132] reporter?

(Question read.)

Q. (By Mr. Williams): Incidentally, before we get to the matters about——

Mr. Levy: You say "at that time." Do you mean at that meeting?

Mr. Williams: Yes, at that meeting. You have got the minutes that show that, Mr. Levy.

The Court: Proceed.

(Testimony of Stanleigh P. Friedman.)

Mr. Levy: I am sorry. You were misinterpreting the registry of my face.

Q. (By Mr. Williams): In that connection may I ask you whether it is or is not a fact that Warner Bros. Pictures, Inc. in the past, preceding 1945, through the years has provided severance pay for all the employees who have left the service of the company? A. That is a fact.

Q. In reference to Bernhard's severance pay, was there anything unusual in the practice of the company in his being provided with six months' severance pay?

Mr. Levy: I object to the form of the question on the ground it is compound.

The Court: And do you object on the ground it calls for his conclusion?

Mr. Levy: And I object on the ground it calls [1133] for his conclusion.

The Court: Sustained. I take it you are asking again for understanding.

Mr. Williams: No; I am asking for the practice, whether this was in accordance with the practice. That is what I am asking.

The Court: Sustained.

Q. (By Mr. Williams): Was anything said in reference to Mr. Bernhard's severance pay that it was a condition to this United States Pictures contract that was being made?

A. Not at all. It was our practice to provide severance pay for our employees who had been with the company for a long period of time.

(Testimony of Stanleigh P. Friedman.)

Mr. Levy: I move to strike the latter part of the witness' answer.

The Court: Motion granted.

Q. (By Mr. Williams): Was there a practice in Warner Bros. Pictures, Inc. to provide severance pay in case of employees of executive character who left after long service?

Mr. Levy: I object to the question on the ground it has no bearing upon this particular issue and on the ground it calls for a conclusion.

The Court: Objection overruled. You may answer. [1134]

Mr. Williams: Will you read the question?

(Question read.)

A. Yes.

The Court: I take it you are referring to some particular time——

Mr. Williams: At the time in 1945, yes. I am talking about the practice at the time——

The Witness: Yes; and for years prior thereto.

Q. What was that practice?

A. Six months' pay.

The Court: The company would give a retiring employee six months' severance pay?

The Witness: Correct.

The Court: Did that apply to all employees?

The Witness: Executive employees who had been with the company for many years.

The Court: How many years?

The Witness: I would say ten years.

Q. (By Mr. Williams): In the case of Mr.



(Testimony of Stanleigh P. Friedman.)

Bernhard, he had been with the company more than ten years at that time, had he not?

A. My recollection is that Mr. Bernhard came to the company in 1930 or 1931.

Q. And had been with them continuously——

A. And had been with them continuously with the [1135] exception of a period when he went into the Navy. He was called upon to render expert services to the United States Navy, during which time he was given a leave of absence of some months.

Q. Was it at the meeting on the 25th of September, 1945, that this matter of Mr. Bernhard's resignation and his severance pay was passed on by the Board?

A. That is my recollection, as refreshed by the minutes and the various depositions that I have read.

Q. Was it at that meeting that Mr. Albert Warner explained what you have already testified about the proposed contract with United States Pictures? A. In general.

Q. Yes. Following that meeting on the 28th of September, the record shows there was another meeting of the Board of Directors. Were you present at this second meeting?

A. Yes, I was.

Q. What was done, if anything, with reference to this United States Pictures contract at that meeting?

A. Mr. Warner, who presided—Albert Warner

(Testimony of Stanleigh P. Friedman.)

—said that I had made a study of it and would make available to the members of the Board the contents of the agreement, which I did at length.

Q. Did you have a copy of the agreement with you? [1136]

A. Yes, I had a copy of the agreement with me on the table.

Q. In addition to that, did you have some other document?

A. I had my short analysis of it.

Mr. Levy: When you say "short,," you smile; is that what you mean?

The Witness: I say "short" with a smile.

Mr. Levy: I see.

Q. (By Mr. Williams): You had the analysis that you have heretofore referred to that they joked about being almost as long as the agreement?

A. That is right.

Q. At that time, in the presence of the members of the Board, state as fully as you can now remember what you told them with reference to the contents, the substance and the effect of this agreement.

A. I didn't read every paragraph from my analysis, nor of the contract. I skimmed over the contract with my analysis and pointed up the important parts of it, and some questions were asked of me, and I had put myself in a position to be able to answer them, which I did. Some of the directors asked questions about the production—one of them, Mr. Catchings, asked about the pro-

(Testimony of Stanleigh P. Friedman.)

duction of an outside picture, and I was able to explain that. [1137] Someone asked what was the meaning of the word "reasonable" in connection with salaries of the producers.

I remember that Mr. Albert Warner said he had been informed that each of the men, Sperling and Bernhard, had agreed at that time for the present to draw a thousand dollars a week, but my memory doesn't serve me very much as to the other questions.

I think Mr. Guggenheimer asked me a question, but I can't remember what it was.

May I add——

Q. Yes.

A. Of course, the inside directors, those who are employees of the company, were acquainted with the contract. I had discussed it with Mr. Carlisle, and, of course, Mr. Perkins, and Mr. Schneider wasn't there at the meeting. He was at the Coast at the time, but Mr. Perkins and Mr. Carlisle and I, of course, knew the terms and knew the contract and its provisions.

Mr. Levy: I move to strike the latter part of the witness' statement with respect to Mr. Carlisle knowing the terms of the contract and Mr. Perkins knowing the terms of the contract. [1138]

The Witness: I discussed it with both of them.

The Court: Motion granted.

Mr. Williams: As to what they knew only?

The Court: Yes.

Mr. Levy: That's right.

(Testimony of Stanleigh P. Friedman.)

Mr. Williams: You are not striking the part where he said he discussed it with both of them?

The Court: No, the motion was not directed to that.

Mr. Levy: That is right, your Honor.

Q. (By Mr. Williams): About how long a time was taken up in your explanation of the terms of the contract to the board?

A. About an hour; but that is purely based upon the best of my recollection as to time. I didn't time it.

Q. I understand that.

A. The average witness doesn't know the passage of time, anyway.

Q. Did you, Mr. Friedman, endeavor to make a complete explanation of all of the terms of the agreement which you consider to be pertinent to the question whether the agreement should or should not be passed by the board?

Mr. Levy: Mr. Friedman, just a moment, I object to the question on the ground it is immaterial as to the endeavors of the witness.

The Court: Sustained. [1139]

Mr. Williams: Here is a case, if your Honor please, where fraud is alleged.

The Court: You can ask him what he understood he did.

Mr. Williams: That is exactly what I am asking him.

The Court: No, you have asked him, "Did you endeavor?" That is an equivocal term, possibly.



(Testimony of Stanleigh P. Friedman.)

Mr. Williams: Every term is equivocal when Mr. Levy comes to discussing it.

Mr. Levy: I am sorry, Mr. Williams, but——

The Court: Intend and understand are two terms pretty well settled in the law.

Mr. Levy: I would like to clear myself on the record.

The Court: You don't need to defend yourself, Mr. Levy.

Mr. Levy: Thank you.

Q. (By Mr. Williams): Was it your intention, Mr. Friedman, at the time you explained this matter to the board to fully and fairly explain all of the terms of the agreement to them so that they would have a clear understanding of the character and effect of the contract?           A. It was.

Q. Was it your understanding you would so explain it to the board?

A. I understood it; I believed it. [1140]

Q. After you had explained the matter to the board and the questions had been asked, was there any action taken by the board?

A. The board enacted a resolution, the precise language of which you have in the minutes.

Q. Did you vote in favor of that resolution?

A. I believe I did.

Q. At that time was it your intention to vote on a contract which would be for the benefit of Warner Bros. Pictures, Inc.?           A. I did.

Q. Did you understand in making your vote

(Testimony of Stanleigh P. Friedman.)

that you were voting on a contract which was for the benefit of Warner Bros. Pictures, Inc.?

A. I did.

Q. Had anybody at any time prior to your vote in any manner, by word, act or deed suggest or intimate to you how you should vote on that resolution?

A. Positively no.

Q. Harry Warner or Jack Warner were not present then, were they?

A. No.

Q. Had you talked with Jack Warner about that contract before you presented it to the board?

A. No, I had not. [1141]

Q. Had you talked with Harry Warner before you proceeded to present it to the board?

A. I had a telephone conversation with Mr. Harry Warner long before the contract was sent to New York——

Mr. Levy: May we have an identification of which Warner?

A. I said I had a telephone conversation with Mr. Harry Warner long before the contract was sent to New York in which he told me that he had been talking with Mr. Bernhard, Mr. Sperling, Mr. Freston and Mr. Schneider and he reminded me that, he mentioned it to me, that he was trying to put together a deal by which the company, Warner Bros. Pictures, Inc., could have the benefit of this independent producer production group to make pictures on the Warner lot for Warner distribution, but he never discussed this contract with me.

(Testimony of Stanleigh P. Friedman.)

Q. Did he at that time make any statement to you with reference to how you should vote on it, if it ever came before you as a director?

A. No.

Q. Now, Mr. Friedman, did you know who Mr. Sperling was at the time of this?

A. Indeed I did.

Q. Was there any discussion before the board as to who Mr. Sperling was, either on the 25th or 28th of September? [1142]

A. There was no discussion, but someone raised the question of what Mr. Sperling's experience had been in the production field. It was answered by Mr. Warner and by me.

Q. What was the substance of what you and Mr. Warner said at that time?

A. Both Mr. Warner and I——

Q. You are referring to Mr. Albert Warner?

A. I am referring to Mr. Albert Warner. Both Mr. Albert Warner and I were aware that Milton Sperling before he went into the service——

The Court: Just what was said in substance at the board meeting?

The Witness: We stated, either Mr. Warner or I stated to the board that Mr. Sperling had been employed by Fox, or 20th Century-Fox, as it afterwards became, prior to going into the service and that he had produced to co-produced certain well known pictures and among them was the outstanding picture *To the Shores of Tripoli*, and now, relying completely on recollection which may have

(Testimony of Stanleigh P. Friedman.)

been colored by the fact that I read depositions since that time, but I do remember that he made a picture with Sonia Henie who was then a very well known skater. There might have been other pictures produced by Mr. Sperling which were stated by Mr. Warner or by me to the board but I can't recall what they were. I cannot reconstruct the meeting sufficiently to [1143] state that those other pictures were named to the board, but everyone of the members of the board of directors knew Mr. Sperling. They all knew who he was and had been acquainted with him.

Mr. Levy: The latter part of the witness' answer is a little confusing. I don't know whether the witness intends to connote by his answer whether the other members of the board knew that Mr. Sperling had done this or the other thing, or just knew impersonally.

The Witness: Just knew impersonally.

The Court: According to your understanding they all knew he was the son-in-law of Harry Warner?

The Witness: They all knew he was the son-in-law of Harry Warner and were all personally acquainted with Mr. Sperling. They had probably all been to his wedding.

The Court: According to your understanding.

The Witness: According to my belief and understanding. [1144]

Q. (By Mr. Williams): Mr. Friedman, what was your opinion as to whether or not Milton Sper-



(Testimony of Stanleigh P. Friedman.)

ling being the son-in-law of Harry M. Warner should be counted in favor of him or against him at that time, I mean from the standpoint of the company?

A. Oh, from the standpoint of the company I thought it was a very advantageous fact and factor that we would have an independent producer of Milton's caliber, who was related to the president of our company and under such a status of regard by Jack L. Warner as I knew he was.

Q. Was there any person at the meeting of the board of directors which approved this contract who voiced any opposition to the contract?

A. No.

Q. Following the passage of the resolution by the board did you have anything to do with the contract after that?

A. I signed the contract.

Q. You signed it following the meeting at which it was authorized?      A. Correct.

The Court: You signed it on behalf of the corporation?

The Witness: On behalf of the corporation. I am a signing officer of the corporation.

Q. (By Mr. Williams): Mr. Friedman, in the course of [1145] business of Warner Bros. Pictures, Inc., when a contract is executed such as that is there any procedure which is followed by the corporation in distributing copies of the contract to certain persons?

(Testimony of Stanleigh P. Friedman.)

Mr. Levy: I object to the question—withdraw the objection.

A. The practice is for the executive officers or the lawyers who procure the signatures to contracts to send them to what is called our “trust department” where we keep all original papers; and that is what I did with this contract in this case.

Q. (By Mr. Williams): Do you know what the practice of the trust department is with reference to acquainting other departments of the fact and terms of the contract?

Mr. Levy: May it please the court, I have no objection to the witness answering that question yes or no; but if it is going to proceed from that point on and the witness is going to testify as to the moves that are made, the various acts passing back and forth that contract and all of that sort of thing, I will object to it.

Mr. Williams: We haven’t got to that point.

Mr. Levy: Very well.

The Court: You may answer the pending question, Mr. Friedman.

The Witness: May the reporter, please? [1146]  
(Question read by the reporter.)

A. I do.

The Court: The question relates to September of 1945?

Mr. Williams: To September of 1945.

A. Of it I am sure.

Q. (By Mr. Williams): At that time what was that practice, Mr. Friedman?

(Testimony of Stanleigh P. Friedman.)

Mr. Levy: If the court please, I object to what the practice was at that time. Of course, I would be in no position to object if the witness can state with authority what was done with this particular contract.

The Court: I take it the purpose of it is to show the ordinary course of business. Of course, I assume they would rely then upon the disputable presumption that the ordinary course of business was followed. Is that your purpose?

Mr. Williams: Yes, your Honor.

The Court: You may answer.

A. In general, the contract is skeletonized and copies of the analysis, the digest of the contract, is sent to various departments of the business, and the contracts are immediately photostated and several copies are retained in the trust department files and other copies are sent around to the various departments that will be concerned with the administration of it.

Q. (By Mr. Williams): In the case of a production-distribution [1147] contract what departments are, in the course of business, affected by the contract?

A. Well, in the first place, the production department; secondly, the distribution department; thirdly, the financing department, Mr. Martin, Mr. Carlisle.

Q. How about the accounting department?

A. And the legal department. Well, the finan-

(Testimony of Stanleigh P. Friedman.)

cial is the accounting department, and then the legal department keeps a copy in the files.

Q. Do you have any personal knowledge with reference to this particular contract whether it followed that course?

A. I think it did, but I haven't any—I can't make the statement definitely. [1148]

\* \* \* \* \*

STANLEIGH P. FRIEDMAN

the witness on the stand at the time of adjournment, was recalled and testified further as follows:

Direct Examination—(Resumed)

Q. (By Mr. Williams): Mr. Friedman, are you familiar with the basic loan agreement between Warner Bros. Pictures and the syndicate of banks headed by the New York Trust Company, which has been marked Exhibit 11 in this case?

A. Just tell me the date.

Mr. Williams: Perhaps the clerk will show Exhibit 11 to Mr. Friedman.

The Court: Exhibit 11, according to Exhibit 102 for [1168] identification, the list, is a loan agreement dated July 21, 1943, between Warner Bros. Pictures, Inc. and a syndicate of banks, the First National Bank of Boston, etcetera and et al.

Mr. Williams: The clerk has now handed the exhibit to the witness, your Honor.

The Witness: I collaborated in the preparation of this document, and I was then familiar with the terms. I am acquainted with it, but I don't know



(Testimony of Stanleigh P. Friedman.)

whether I am familar with the terms at this late date. \* \* \* \* \*

Q. Did you examine Exhibit No. 1 with reference to the question of whether there might be or was an apparent or actual conflict between the provisions of that [1169] agreement and the agreement Exhibit 11? A. Yes.

Q. Did you form an opinion on that subject at that time? A. Yes.

Q. What was that opinion?

A. That the agreement of September, 1945, between Warner Bros. Pictures, Inc. and United States Pictures did not contravene the terms of the bank loan agreement.

The Court: Exhibit 11?

The Witness: Exhibit 11, and subsequent bank loan agreements which were then in existence.

\* \* \* \* \* [1170]

Q. Did you, in addition to studying this matter and forming your own opinion, discuss the matter with any attorney representing the banks?

A. Yes.

Q. What attorney was that?

A. Al Houston of White & Case.

Q. Did he give you an opinion on that subject?

A. Yes. [1171]

Q. Was that opinion given to you orally?

A. Orally.

Q. Was there later a writing?

A. It was confirmed in writing.

Mr. Williams: May I point out, if your Honor

(Testimony of Stanleigh P. Friedman.)

please, that the letter from White & Case which is referred to has been marked in this case No. 16. I believe that is in evidence already, your Honor.

Mr. Levy: Plaintiff's Exhibit 16.

Mr. Williams: May the witness examine Plaintiff's Exhibit 16?

Q. I show you now Plaintiff's Exhibit 16 and ask you whether that is a photostat copy of the letter you received from White & Case in reference to this matter, and concerning which you have just testified? A. Yes, it is.

Mr. Williams: I am going to refer now to the matter of the so-called Hemisphere agreement, which has been marked in evidence in this case as Exhibit 3-A. May the witness have an opportunity to examine that agreement? May the witness also examine Exhibit 3 together with 3-A, at the same time?

The Court: Yes.

Q. (By Mr. Williams): You have before you now [1172] Exhibit 3, which is an amendment to the basic agreement and an amendment of the agreement between Warner Bros. and United States Pictures dated May 20, 1946, and also 3-A, which is an agreement between United States Pictures and the Hemisphere Company. Did you at any time examine those agreements? A. I did.

Q. About when was it that you examined the agreements?

A. When they were sent on from the Coast, and I think about the date of the agreements.

(Testimony of Stanleigh P. Friedman.)

Q. Yes.

A. I can be sure of that by having a reference to the minutes of the Board of Directors at which this amendment to the basic agreement with regard to Hemisphere Films was enacted or was considered.

Q. If I call your attention to Exhibit 20 in this case——

The Court: Mr. Clerk: Will you place Exhibit 20 in front of the witness?

The Clerk: Yes, your Honor.

Q. (By Mr. Williams): You have before you now Exhibit 20, which is the record, or extracts from the minutes of a special meeting of the Board of Directors of Warner Bros. held on June 18, 1946. Are those the minutes to which you refer that would [1173] help you in answering the question as to the time when you examined Exhibits 3 and 3-A?

A. It states to my satisfaction that I had received the amendatory agreement between Warner Bros. Pictures, Inc. and United States Pictures at or shortly after the date of the agreement, May, 1946, and then I made an analysis of it, a complete analysis of it, in a little bit shorter form, which I presented to Major Warner and Mr. Schneider, which discloses the results of the change as it affected Warner Bros. Pictures, Inc.

Q. Will you state what character of analysis you did make?

A. I have before me a document, which bears date July 2, 1946, and that will give you a very good idea of what type of analysis I made.

(Testimony of Stanleigh P. Friedman.)

The Court: Is that a document heretofore marked?

Mr. Williams: No, it has not been marked, if your Honor please. It might be marked for identification.

Q. Would you refer to that, and from that could you give us a statement of what the details of your analysis were?

The Court: Mr. Clerk, will you mark the document the witness now has as Defendants' Exhibit L for identification.

Mr. Levy: May I glance at it for a moment, your Honor? [1174]

The Court: Yes.

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit L for identification.)

The Court: Please hand it to counsel.

Mr. Levy: Thank you.

The Witness: May I have the question, Mr. Reporter?

(Question read.)

The Witness: I could.

Q. (By Mr. Williams): Will you do so, then?

A. This is a memorandum which I prepared at the time:

"The deal between Warner, U.S. Pictures and Hemisphere Films, Inc., a newly organized California corporation, the numerical control of whose stock is owned by U.S. Pictures, is on the following basis:



(Testimony of Stanleigh P. Friedman.)

“The basic agreement between Warner and U.S. Pictures is to be amended so as to provide that the second of the six pictures which U.S. contracted to produce for Warner shall be the picture *Pursued*, which will be produced by Hemisphere on the Warner lot.

“U.S. will lend to Hemisphere 50 per cent of all cost of production which amount U.S. will [1175] borrow in cash and facilities from Warner. The other 50 per cent Hemisphere will borrow from The New York Trust Company. U.S. Pictures and Warner will enter into an agreement with the bank under which the first moneys from the gross receipts of the picture, after deducting distribution fees and expenses, will be paid to the bank until the loan with interest is paid. The profits of the picture will be divided one-third to Warner and two-thirds to Hemisphere (one-half of which will go to U.S. by reason of its ownership of approximately half of the stock of Hemisphere). This compares with the terms of the original U.S.-Warner basic agreement under which Warner would be entitled to 50 per cent of the profits.

“It is estimated that the difference between 50 per cent of the profits which Warner would be entitled to receive under the original agreement with U.S., and the 33-1/3 per cent which it will now receive on the new arrangement covering the picture *Pursued* will be somewhat made up by the following:

(Testimony of Stanleigh P. Friedman.)

“(i) Warner’s participation in increased distribution charges. [1176]

“Under the original basic agreement Warner is entitled to distribution charges of 20 per cent domestic and 25 per cent England, etc. The new agreement with Hemisphere provides that the distribution charge for domestic shall be increased to 25 per cent and for England to 30 per cent, with varying rates for the rest of the world as provided in the original basic agreement between U.S. and Warner. This differential of 20 per cent is to be split 50-50 between U.S. and Warner.

“(ii) Warner’s participation in increased overhead charges in respect of this picture:

“U.S. will provide stage space and ‘facilities’ for Hemisphere on the Warner lot and charge Hemisphere as overhead 45 per cent of all direct cost items of the picture. This compares with a probable average overhead charge of 25 per cent which U.S. Pictures now pays to Warner under its basic agreement with Warner. The differential of 20 per cent will be divided equally between U.S. Pictures and Warner.

“(iii) Warner’s equal participation in a 15 per cent service charge on national advertising, interest to be charged on advances, and \$50,000 to be deducted from profit before Hemisphere [1177] participates therein.

“U.S. Pictures in its agreement with Hemisphere will charge the latter a service charge of 15 per cent on the national advertising of the picture,

(Testimony of Stanleigh P. Friedman.)

interest on its advances at the same rate as paid for the bank loan, and will also deduct from the profits \$50,000. These amounts will be equally divided between U.S. Pictures and Warner.

“Of course, increased distribution and overhead charges will diminish the net profits in which we share. Such profit is also adversely affected by an item of \$17,500 for U.S. Pictures and Hemisphere lawyers fees charged to the cost of the picture.

“Mr. Carlisle has made computations on a hypothetical \$2,500,000 gross for the picture and his figures show that Warner will receive practically the same financial benefit on the new basis as on the old. (\$175,000 on the old against \$167,000 on the new). He has also made computations on a basis of \$3,000,000 gross and on such basis Warner would get somewhat more on the old basis than on the new (\$362,500 on the old basis against \$308,000 on the new). His figures are herewith [1178] presented. It should be noted that the larger the gross income the greater the disparity between old and new basis becomes.

“U.S. and Warner each give up the same amount to make the deal on Pursued and share equally in the net return from the production and distribution of the picture.

“If the transaction is approved, please let me know so that I can complete the preparaton of the necessary papers.”

Subjoined to this is a typewritten note:

“Mr. Albert Warner in the presence of Mr.

(Testimony of Stanleigh P. Friedman.)

Schneider authorized S. P. Friedman to proceed with the deal according to this memorandum."

Appended to which is a computation handed to me by Mr. Carlisle: "Assuming World Gross of \$2,500,000," a comparison of the old basis and the new basis; and the second sheet: "Assuming World Gross of \$3,000,000," a comparison of old basis and new basis. [1179]

Q. Did you understand in connection with this deal who were involved in Hemisphere, what personalities were involved in Hemisphere?

A. I was aware.

Q. And who were those persons?

A. Teresa Wright, who played a very important role in Mrs. Miniver, and Niven Busch, her husband, who was the author of the screen play Pursued.

Q. Was any information given to you as to what, if any, were the demands of Niven Busch and Teresa Wright as to the use of the play and the service of Wright?           A. Yes.

Q. From whom did you get that information?

Mr. Levy: Just a moment. I object to the form unless the witness states about when and where and the circumstances.

Mr. Williams: We are getting to that. I can only do it one at a time.

Mr. Levy: Very well, Mr. Williams.

The Witness: The question, please, Mr. Reporter.

Mr. Williams: The first question was who gave the information.

A. I believe a telephone conversation with Mr.



(Testimony of Stanleigh P. Friedman.)

Schwab or Mr. Sperling, but I am very hazy in my recollection of who told me about it.

Q. What were you told? [1180]

A. I was told that this was the deal which the Hemisphere people—which Niven Busch and Teresa Wright were willing to enter into to make this picture with the use of Niven Busch's script.

Q. When were you given that information?

A. At or about the time of the transaction.

Q. Were you given the information before the matter came on before the board of directors of the company?

A. Yes.

Q. Were you present at the board meeting when this deal was approved?

A. Yes.

Q. The meeting of June 18th?

A. Yes.

Q. And was there any discussion of the deal among the directors at that time?

A. There was none.

Q. Was there any explanation of the deal to the directors?

Mr. Levy: Just a moment, please. The witness said "There was none." Does the witness mean no discussion?

The Witness: There was no discussion.

Q. (By Mr. Williams): Was there any explanation of the deal to the directors at that meeting?

A. Yes, I made the explanation of the deal.

Q. Can you state generally what you stated to the board at that time?

A. Relying on my memory, again, I stated to the board that it was proposed to substitute Pur-

(Testimony of Stanleigh P. Friedman.)

sued for the second picture in the production schedule of United States Pictures, Inc.; that the Hemisphere Corporation had been formed between United States Pictures and Wright and Niven Busch and that this picture Pursued would be the second picture in the program of production by United States Pictures. I explained the terms pretty much the same as I explained them in my memorandum to Mr. Warner and Mr. Schneider.

The Court: That is Exhibit L for identification?

The Witness: That is Exhibit L for identification.

Q. (By Mr. Williams): At the time you considered this matter and voted on it did you understand at that time that in order to obtain this story and the services of Teresa Wright it was necessary to make a deal of the character that was involved in this contract? A. Yes.

Q. Did you understand that unless a deal of that character were made, that neither the story nor the services of Miss Wright could be obtained?

Mr. Levy: Just a moment. I did not object to the previous question, your Honor, but this question goes one step further. I think the previous question was to the effect: [1182] Did you understand—well, I forget just what the exact wording was. Now we are going beyond that point, where the witness has to speculate on what a lot of other people had in mind.

The Court: The question merely calls for his understanding. Of course, you may cross examine

(Testimony of Stanleigh P. Friedman.)

him fully on the basis of that understanding if you wish.

Mr. Levy: Very well, your Honor.

The Witness: The question, please.

(Question read by the reporter.)

The Court: You may answer.

A. Yes, that was my understanding.

Q. (By Mr. Williams): Did you understand in voting for this transaction as a director that you were voting for a transaction which was favorable to the interests of Warner Bros. Pictures, Inc.?

A. Yes.

Q. And was it your intention to vote for a transaction which would be for the interests of that company?

A. It was.

Q. Mr. Friedman, I call your attention to the meeting of the board of directors of Warner Bros. Pictures, Inc. which is evidenced by an exhibit in this case, Exhibit No.—I am referring to the meeting of August 17, 1950.

A. I remember the occasion of the meeting, Mr. Williams. [1183]

Q. Oh, yes, that is August 17, 1950, Exhibit No. 23.

A. I remember the meeting of August 17, 1950.

Q. You remember the meeting. That is the meeting at which there was brought up the matter of an extension or an amendment to the basic agreement between United States Pictures and Warner Bros. Pictures, and also some reference to the amendment of December 6, 1947?

(Testimony of Stanleigh P. Friedman.)

A. I remember the meeting.

Q. Yes. Were you present at that meeting?

A. I was.

Q. And prior to the meeting did you have any information as to this matter being brought before the meeting?

A. I was on my holiday down at Nantucket Island, Massachusetts and Mr. Perkins, our general counsel, called me on the telephone and said that it was proposed that there be a further extension of the United States Pictures-Warner program and asked for my oral approval. And I told him that it certainly met with my approval. But the meeting was not held until I got back, and when I got back to New York that meeting was held and the resolution which is in the minutes was enacted by the board of directors.

Q. Was that matter explained to the board there at the time of the meeting?

A. Well, I——

Mr. Levy: Does he know which matter you are referring [1184] to, Mr. Williams?

Mr. Williams: The extension agreement.

A. The extension agreements were stated to the board and what was proposed to do.

Q. You voted in favor of that, did you?

A. I did.

Q. Did all the other directors vote in favor of it?

A. They did.

Q. Did you understand at that time in voting to that effect that you were voting for a matter



(Testimony of Stanleigh P. Friedman.)  
which was for the benefit of Warner Bros. Pictures, Inc.?      A. Yes.

Q. And did you intend in so voting to take action favorable to the interests of Warner Bros. Pictures, Inc.?      A. I did so intend.

Q. Now I call your attention to the stockholders meeting of 1946, that was held in November 1946, and in particular to the notice of meeting and proxy statement accompanying it, dated January 10, 1946, which is Exhibit No. 21 in this case. Are you familiar with that proxy statement?

A. I am familiar with the proxy statement and the notice.

Q. Did you have anything to do with the preparation of the proxy statement?

A. I collaborated in the preparation of it.

Q. And in particular, with reference to that portion of the proxy statement which recites the terms of the deal between Warner Bros. and United States Pictures and the bank arrangements that were being made, did you assist in the drafting of that particular portion of it?      A. Yes, yes.

Q. May I ask you what was the purpose of putting this particular transaction into the proxy statement?

A. To conform with the rules of the Security Exchange Commission which required a statement of all transactions with directors.

Q. And because Bernhard had been a director?

A. And because Bernhard had been a director.

(Testimony of Stanleigh P. Friedman.)

Q. Were you present at the meeting of the stockholders which followed?      A. Yes, sir.

Q. Was there any objection made by any person to this transaction at that time?

Mr. Levy: Just a moment. That is assuming a state of facts not in evidence: Was there any objection?

Mr. Williams: I am just about to put them in evidence.

Mr. Levy: Was there any objection made by any person to the——

Mr. Williams: At the hearing.

Mr. Levy: ——to the contract Exhibit 1, is that what [1186] you said?

Mr. Williams: Yes.

Mr. Levy: Well, there is no evidence that the matter was brought before the meeting of the stockholders of Warner Bros.

Mr. Williams: The proxy statement itself is in evidence, showing that the members——

The Court: Is the purport of your question to ask the witness did he hear at the stockholders meeting any objection voiced?

Mr. Williams: Any objection voiced.

The Court: To Exhibit 1. Is there objection to the question in that form?

Mr. Levy: May it please the court, we have not in evidence—it seems that we have in evidence all of the stockholders meetings of Warner Bros. beginning with 1947 down to the present, but we

(Testimony of Stanleigh P. Friedman.)

haven't in evidence the minutes of the stockholders meeting of 1946. The witness is being asked——

The Court: Where is that? Where are the minutes of that meeting?

Mr. Levy: I do not know.

Mr. Williams: You never asked for them. We provided counsel with everything they asked for.

The Court: Are they available?

Mr. Williams: They could be available on a day's notice [1187] or so. We have provided counsel with everything they asked for.

Mr. Levy: I believe that I asked for all of the meetings of the stockholders. Maybe I am in error. But, if you will examine my——

The Court: You may have been confused on the year. Do you wish them now?

Mr. Levy: It is possible that I was confused, your Honor.

Mr. Williams: We will get them for him.

Mr. Levy: But the only reason I made the objection, your Honor, is this: I have read the minutes of the stockholders meetings each and every year.

The Court: Including the year 1946?

Mr. Levy: No, your Honor; those that are in evidence, beginning with the year 1947. And when the witness was asked the question: Was any objection raised by any stockholder, I was in the dark and what I wanted to know was—what I wanted to make sure was that the question did not assume a state of facts not in evidence, namely, if

(Testimony of Stanleigh P. Friedman.)

the question had not been brought up at the stockholders meeting at all, to ask a witness a question: Did anybody object to it? would be just producing information, that is, gathering information into this record which would be contrary to the actual fact. And that is the only reason why I interposed the objection and that was why I was careful to note the form of Mr. [1188] Williams' question. Otherwise it would just pass by.

The Court: Do you wish the minutes produced of the 1946 meeting of the stockholders?

Mr. Levy: Yes, your Honor. I have not seen them. I do not know what is in them, but I am quite sure that under the circumstances they would be informative.

The Court: Can they be here tomorrow?

Mr. Williams: They can be here tomorrow.

The Witness: You have got copies here?

Mr. Williams: Not the 1946.

The Witness: You will have to telegraph New York for them.

Mr. Levy: Well, I have no objection to the witness' recollection presently, under the circumstances, until they can be supplied, as long as the witness who was at the meeting will say: This proposition was brought up, et cetera, et cetera, and what transpired. I have no objection to that.

The Witness: Very good. \* \* \* \* \*

The Court: The question, as I understand it, is this: Did the witness hear at that meeting any ob-



(Testimony of Stanleigh P. Friedman.)

jection voiced to the transaction which is embodied in Exhibit 1? [1189]

Mr. Levy: Assuming such transaction was presented to the stockholders.

The Court: No, without assuming anything.

Mr. Williams: Without assuming anything.

The Court: Except there was a meeting, he was present, and did he hear——

Mr. Levy: Any objection?

The Court: ——any objection voiced, and you may cross examine him on it.

Mr. Levy: Very well, your Honor.

The Court: You may answer.

A. My answer, heretofore given, is that no objection was voiced by anybody at the meeting of the stockholders.

Mr. Williams: You may cross examine.

The Court: Before we leave the subject of the minutes——

Mr. Williams: We will get them as soon as we can. I thought we might possibly have a copy in my office, but if we have not, we will telegraph to New York for them today.

The Court: Very well.

Mr. Williams: I assume a copy is all that is necessary.

Mr. Levy: Surely. \* \* \* \* \* [1190]

### Cross Examination

Q. (By Mr. Levy): Taking that last meeting up that we just referred to, Mr. Friedman, before

(Testimony of Stanleigh P. Friedman.)

we go any further, you were present at that meeting?

Q. You are referring to the stockholders meeting?

Q. Yes, of 1946?           A. Yes, I was.

Q. Was the question presented at all to the stockholders, namely, the agreement between United States Pictures and Warner Bros. Pictures?

A. I am in doubt about that.

Q. In other words, did anybody get up and say——           A. Excuse me. I did not——

Q. ——an agreement has been entered into between our corporation and Warner Bros. Pictures, and this, that or the other, thing are parts of the agreement? Did anybody say anything like it?

A. I am in doubt about it, but I believe that Judge Morris, Hugh Morris, former Federal Judge in Wilmington, Delaware, who presided at the meeting read a memorandum which might have—I believe it did—mention the fact that the contract such as advised to our stockholders in the proxy statement had been entered into between the corporation and United States Pictures. [1191]

Q. Mr. Friedman, you were present at that meeting?           A. Yes.

Q. In your opinion, Mr. Friedman, had you been a stockholder who was merely attending that meeting, without any previous knowledge of any of the doings of the corporation, but having before you merely the proxy statement and having read carefully, for that matter, the proxy statement and

(Testimony of Stanleigh P. Friedman.)

having heard whatever was said by whomsoever who said it, in your opinion would you have known the substance of the agreement between Warner Bros. Pictures and United States Pictures?

Mr. Williams: That question is objected to on the ground it calls for conclusion and speculation on the part of the witness, and incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Levy): Were you a stockholder?

A. Yes.

Q. Of Warner Bros.? A. Yes.

Q. I understood you to say that you collaborated on the drawing of the proxy statement—right?

A. I do not know what your understanding was, but I so stated.

Q. And with whom did you collaborate in the drawing of that proxy statement? [1192]

A. With Mr. Perkins, Mr. Bareford and Mr. Hessberg. Bareford and Hessberg are lawyers and assistant secretary. Mr. Perkins is general counsel.

Q. Yes. \* \* \* \* \*

Mr. Williams: 21, your Honor, is the proxy statement.

Mr. Levy: Yes, that is the one I referred to, 21.  
\* \* \* \* \*

Q. (By Mr. Levy): Now, Mr. Friedman, on page 3 of [1193] Exhibit 21, you testified that the paragraph of that exhibit which is headed by the words "Transactions between the corporation and directors," which proceeds down to almost the bot-

(Testimony of Stanleigh P. Friedman.)

tom of the page of that exhibit and which is followed by another paragraph making reference to the loan agreement between Warner Bros. and The New York Trust Company, which continues on to the top of the following page of this exhibit—I understand that you were the author; is that what you want us to understand, that you authored that, that language?

A. Your question is what you understand. What I testified to was that I collaborated.

Q. Did you author that language?

A. I collaborated in the language.

Q. And the object of both of these paragraphs was merely to satisfy SEC regulations, is that correct?

A. That is one of the objects, and the other object is to advise the stockholders of the transactions.

Q. You say that that was one other object of those two particular paragraphs?

A. Correct.

Q. To advise the stockholders of what, Mr. Friedman?

A. To put them on inquiry if they wished further notice, to advise them that there were these transactions with directors. [1194]

Q. With directors?

A. With directors.

Q. But with nobody else, is that right?

A. No one else?

Q. That was close to the corporation?



(Testimony of Stanleigh P. Friedman.)

A. I beg pardon.

Q. With nobody else. These paragraphs were not directed to putting the stockholders on notice that a son-in-law of the chief executive of Warner Bros. is or was to be connected with the particular transaction covered by these two paragraphs?

A. Well, certainly——

Q. That was not an object, was it?

A. No, that was not an object.

Q. You knew at the time, of course, as you testified that Milton Sperling was going into partnership or to be half-owner of stock of United States Pictures, did you not?      A. Correct.

Q. And you did not think, did you, it necessary for the stockholders to be informed of that fact, did you?      A. I did not.

Q. Although the relationship was present in your mind and you had an awareness of it at the time that you satisfied SEC regulations by the inclusion of these paragraphs, is that correct? [1195]

A. I was aware of it.

Q. So that you would say that these paragraphs were intended to satisfy SEC regulations, and in addition to that, put the stockholders on inquiry with respect to a transaction had between the corporation and a relative of its chief executive?

A. Yes, sir.

Q. You still cling to that answer, do you?

A. I still cling to that answer.

Q. I see. Is it fair to ask you whether or not you thought it important at that time that the

(Testimony of Stanleigh P. Friedman.)

stockholders be informed of the relationship between the chief executive of Warner Bros. and one of the persons interested in the contract that you were describing?

A. If I had thought it important, I would have suggested that it be incorporated in the notice or in the proxy statement. I did not think it was important.

Q. Did you give it consideration before you came to the conclusion as to whether it was important, in your opinion, or not? A. Yes.

Q. And did you consult with anybody else on that particular phase of it? A. Yes.

Q. And after consultation with some other persons, you [1196] concluded it was the concensus, or was it the unanimous opinion of those with whom you collaborated, that the thing had better not be mentioned?

A. It was the concensus of opinion that it need not be mentioned.

Q. That it need not be mentioned?

A. Correct.

Q. Nobody dissented from that view?

A. No one dissented.

Q. And may I ask now with whom you had these discussions on that particular subject?

A. Mr. Perkins, Mr. Harold Bareford, Mr. Edward Hessberg.

Q. Mr. Carlisle?

A. Well, he may have been consulted on other

(Testimony of Stanleigh P. Friedman.)

terms, other provisions of the proxy statement, or Mr. Martin who works with him.

Q. Mr. Catchings? A. No.

Q. Mr. Guggenheimer? A. No.

\* \* \* \* \* [1197]

Q. Did you oversee, in any way, or did you do any act, or were you consulted in any way, with respect to the [1229] performance by the parties to that contract?

A. Only with respect to the extensions when they were brought before the Board of Directors, of which I had knowledge in advance; but the performance of the contract I was not kept advised of.

Q. You are speaking of which contract?

A. The basic agreement as amended.

Q. So that from the time the basic agreement was made, namely, Exhibit 1, down to this very day, you had no knowledge of any kind as to what was done in the performance of it, with the exception of such knowledge as came to you when the subject of its amendment was presented to the Board of Directors?

A. And where it was necessary for banking arrangements to be included—where the amendments were required in connection with banking arrangements, then I would know what the figures were, to some extent; but in the course of the years from 1945 to 1953 I had no direct connection with performance of the contract.

Q. May I ask you, Mr. Friedman, at whose instance were you elected a director of Warner Bros.?

(Testimony of Stanleigh P. Friedman.)

A. I was elected, I think, on the nomination of the Messrs. Warner. I was elected by the Board of Directors to fill a vacancy in 1930.

Q. Just prior to 1945, prior to September 28, 1945, [1230] at whose instance were you re-elected a member of the Board of Directors?

A. The Board of Directors names a slate and I was named by the Board of Directors.

Q. Who in the Board of Directors does the naming of the slate originally? Who originally composes the slate?

A. The presiding officer asks, "Are there any recommendations for change in the Board of Directors?"

Q. Whom does he ask?

A. He asks the Board of Directors.

Q. He doesn't ask that of Mr. Harry Warner?

A. If Mr. Harry Warner is the presiding officer, he would do that; or if Mr. Albert Warner is the presiding officer, he would do that.

\* \* \* \* \* [1231]

Q. Let me ask you this question pointblank: Is it generally Mr. Harry Warner who is asked if he wishes to make any changes in the personnel of the Board?

A. Never in my presence.

Q. Let me ask you this question pointblank: Does Mr. Harry Warner, in effect, control the naming of the Board of Directors?

A. My statement is, unequivocally, "No."

Q. Have you read Mr. Carlisle's deposition?

A. Yes.



(Testimony of Stanleigh P. Friedman.)

Q. I direct your attention to what Mr. Carlisle said in his deposition.

Mr. Williams: I object to the witness being called upon to comment on the testimony of another witness.

Mr. Levy: I am not calling upon the witness to comment upon the testimony of another witness. I haven't finished my question.

The Court: The objection is overruled. Complete your [1232] question.

Q. (By Mr. Levy): Mr. Carlisle was asked as follows:—

The Court: You are reading from where?

Mr. Levy: I am reading from Exhibit 113 in evidence.

The Court: Page and line?

Mr. Levy: Page 45, line—I am afraid I cannot answer that question without counting the lines, because there are no numerals in the margin.

The Court: Toward the foot of the page?

Mr. Levy: Toward the foot of the page.

The Court: Very well; you may proceed.

Mr. Levy: This question was asked of Mr. Carlisle:

“Q. At whose instance were you elected a director of this company, Mr. Carlisle?

“A. Mr. Warner.

“Q. Which Warner?                      A. H.M.

“Q. I take it that as annual election of directors takes place, the directors are nominated by a group, a committee?

(Testimony of Stanleigh P. Friedman.)

“A. It is generally Mr. Warner there that is asked if he wishes to make any changes.

“Q. And he in effect controls the naming of the Board of Directors, does he not?

“A. That is those inside the organization. [1233]

“Q. Yes. And are you mindful of that?

“A. Yes.

“Q. Mr. Warner and his two brothers in effect control, do they not, whether or not you shall stay on as controller or assistant treasurer of the company? A. Certainly.”

Q. I ask you, Mr. Friedman, does Mr. Warner and his two brothers in effect control whether or not you shall stay on as an attorney for Warner Bros. Pictures, Inc.?

Mr. Williams: Just a moment, before you answer that question. I have no objection to the question whatsoever, but I object definitely to the including of the reading of the testimony of another witness in the matter as making it argumentative in form and asking by implication for an improper comment on the veracity or correctness of the testimony of another witness.

The Court: It is preliminary to the asking of the question, I take it. It is not a part of the question.

Mr. Williams: If it is understood it is not a part of the question, I move to strike that part as being a voluntary statement by counsel which has no place in the record. [1234]

The Court: Do you resist the motion to strike?

(Testimony of Stanleigh P. Friedman.)

Mr. Levy: No. It is in evidence anyhow.

The Court: Granted. Do you mean to ask, Counsel, for his understanding?

Mr. Levy: Yes, your Honor.

The Court: Do you have the question in mind?

The Witness: I haven't the question in mind.

Mr. Levy: I shall ask the question again.

The Witness: Whether the three Warner brothers control my continuance in office as an attorney?

Q. Whether the three Warner brothers control the employment by Warner Bros. of you, yes, Mr. Friedman.      A. As an attorney?

Q. As an attorney, yes.

A. The three Warner brothers own about 15 per cent of the stock of the corporation, but if I became persona non grata to any of the Warners or to any other executive, I could not continue as an attorney, and would certainly feel that my presence was no longer required or requested, and I would resign as an attorney.

Q. That is because they are holders of 15 per cent of the stock?

A. That is not the reason; but they are the chief executive officers of the company.

Q. But you said something about 15 per cent of the [1235] stock.

A. I said they own about 15 per cent of the stock, and if you consider that control, I don't want to quibble with you on the word "control."

Q. How do you consider it?

A. I don't consider it control.

(Testimony of Stanleigh P. Friedman.)

Q. You don't consider it working control either?

A. I don't consider it working control either.

Q. Do you consider it as having considerable influence on the affairs of the corporation?

A. I would say it was quite a nucleus by which to obtain additional stock by proxy.

Q. And that is the extent to which you think the Warner brothers had an advantage over any other stockholder in the situation?

A. Absolutely.

Q. Only by virtue of the fact that 15 per cent of the stock ownership was a nucleus from which it could thereafter proceed to gather together the rest of the stockholders to act in accordance with what they conceive to be the thing to do?

The Court: "It could"?

Mr. Levy: They—whether the ownership or control of 15 per cent of the stock——

The Court: The question now is whether the witness [1236] understands it.

The Witness: I understand it, and I would like to answer it.

The Court: Very well.

The Witness: The Messrs. Warner have been the executive officers of this corporation from its inception. They have brought the corporation through thick and thin, financial difficulties of all kinds——

Q. (By Mr. Levy): May I interrupt?

A. Please let me continue. I am entitled to answer your question, and the fact that they have done so well for the corporation, coupled with the fact



(Testimony of Stanleigh P. Friedman.)

that they own 15 per cent of the control would indeed be a nucleus from which they could get huge stockholder proxies for re-election of directors.

Q. But you concede now, do you, or, if you don't, please say so, that for whatever the reason is, the Warner brothers had control of this company?

A. They had 15 per cent of the stock of the company.

Q. And that they controlled the operation of the company, did they not?

A. I think that their opinions would be very much valued, but to say that they controlled the operations of this company simply by virtue of the fact that they own 15 per cent of the stock is not accurate. [1237]

Q. In your judgment, Mr. Friedman, did they control the over-all policies or the basic policies of this company, in your opinion?

A. I think they did, but not by virtue of the fact that they own 15 per cent——

Q. Irrespective——

Mr. Williams: Just a moment. May the witness be allowed to finish his answer?

The Witness: May I finish?

The Court: Yes, finish your answer.

The Witness: I said I think they would, but not by virtue of the fact that they own 15 per cent of the stock of the corporation.

Q. (By Mr. Levy): But by virtue of what?

A. By virtue of their past history and the suc-

(Testimony of Stanleigh P. Friedman.)

cess with which they have managed the corporation from its inception right down to this date.

Q. But, nevertheless, you concede that they controlled the policies of this corporation?

Mr. Williams: Just a moment. That question is objected to as having been asked and answered; and on the further ground it is argumentative in form.

The Court: Sustained.

Q. (By Mr. Levy): Mr. Friedman, before the Board of Directors acted on the contract, on the basic agreement, [1238] Exhibit 1 in evidence, at the meeting of September 28, 1945, did Major Albert Warner in substance convey to the directors present that the agreement was a good one for Warner Bros. and a beneficial one for Warner Bros.?

A. He gave it as his opinion that it was to the advantage of Warner Bros. Inc.

Q. Would you say that he recommended its adoption?

A. I would say that he recommended its adoption.

Q. Would you say that in what he said he conveyed to the Directors present that Harry, Jack and Albert Warner would like to see the Board adopt this resolution?

A. I don't think that is a fair statement. I don't think that he said they would like it adopted. They wanted it submitted to the Board of Directors for their consideration, and the approval was recommended by Mr. Albert Warner.

(Testimony of Stanleigh P. Friedman.)

Q. You are narrating what happened, but what I am asking you is this—you were present: I ask you whether from what you heard Mr. Albert Warner say, did he convey to you, as an individual, now, the impression, did you carry away the thought, in other words, were you made aware, were you conscious of the fact that Harry, Jack and Albert Warner would like to see the Board adopt this resolution? A. I carried away the thought——

Q. Yes or no. [1239]

A. I can't answer yes or no.

The Court: Counsel, you are master of the question but the witness is master of the answer. He is under oath.

Mr. Levy: I thought it was a categorical question.

The Witness: May I have the question?

(Question read.) [1240]

The Witness: May I have the question, Mr. Reporter?

(Question read by the reporter.)

A. I carried away the thought that they recommended this deal as beneficial to the corporation but wanted to submit it to the board of directors for their consideration.

Q. (By Mr. Levy): The fact that a son-in-law of the chief executive of the corporation was involved, and directly and indirectly in the issue before you, did that play a part in the ultimate impression that you carried away with you from the words of Mr. Albert Warner?

(Testimony of Stanleigh P. Friedman.)

A. I think it enhanced the value of the contract to Warner Bros. Pictures, Inc.

Q. In other words, it struck you as the more favorable because of that circumstance?

A. Correct. [1241]

\* \* \* \* \*

Q. Did you have anything to do, directly or indirectly, with the amendment to the master contract which was made with respect to this Hemisphere business on December 9, 1947?

The Court: Exhibit?

Mr. Levy: Exhibit 5 in evidence. [1243]

\* \* \* \* \*

Q. (By Mr. Levy): Did you participate either in the drawing of that agreement——

A. No.

Q. ——or in any of the negotiations——

A. No.

Q. ——that entered into it? A. No.

Q. This was out of your ambit entirely?

A. At that time it was, yes.

Q. Are you familiar with the transaction that is involved there?

A. I am aware of it. I am not familiar with it.

Q. You can contribute no information to this court with respect to any part of it, in your opinion? A. Regretfully, no.

Q. I see. You are aware, are you not, Mr. Friedman, that the December 6, 1947 amendment to the master contract which is Exhibit 4 in evidence was not presented to the board of directors of Warner



(Testimony of Stanleigh P. Friedman.)

Bros. for approval or disapproval at all? Are you aware of that fact?

A. I am aware of it, yes. [1244]

\* \* \* \* \*

Q. Mr. Friedman, I did not ask you why it was not presented to the board of directors. I merely asked you when you first became aware that there was such a thing as Exhibit 4.

A. When I got back from my holiday about the 15th of January in 1948.

Q. Then you found certain memoranda on your desk which indicated——

A. I had a copy of the letter of transmittal to the [1245] trust department with the terms, the highlights of the amendment.

\* \* \* \* \*

Q. Were you aware of the fact that on March the 3rd, 1947 Mr. Harry Warner had guaranteed a promissory note of United States Pictures to the extent of \$150,000?

A. I don't—I can't say that I was aware of it at the time. It is hard for me to relate that knowledge to any particular time. I knew of the fact that Mr. Warner had guaranteed, endorsed a note of United States Pictures, but I can't relate that knowledge to any particular time.

Q. Is your recollection sufficiently active on that subject that you can say with some reasonable certainty how long after you came back from your vacation and found these documents on your desk did you ascertain the fact that Mr. Harry War-

(Testimony of Stanleigh P. Friedman.)

ner had guaranteed, had individually guaranteed an obligation of United States Pictures to the tune of [1246] \$150,000?

A. I didn't. If I may correct you, please, I didn't find the documents. I found a copy of the letter of transmittal.

Q. Yes.

A. Of December 26, 1947. And I am about to answer your question directly by saying I do not believe I had knowledge at that time that Mr. Warner, Mr. Harry Warner had guaranteed the loan.

Q. I see.

A. But it would be impossible for me to relate the time of my knowledge to any specific period.

Q. But at any rate, you are specific and certain on this subject, that on December 6, 1947 you did not know that Harry Warner had theretofore, on March 3, 1947, guaranteed such an obligation?

A. I don't think I did, Mr. Levy.

Q. Having received that letter of transmittal which indicated that that amendment had gone through the various departments of Warner Bros., among which was the trust department, you did not call a meeting of the directors of Warner Bros., did you, to approve that particular transaction?

A. No, I did not.

Q. Although it had already been set in motion?

A. I did not. [1247]

Q. Can you explain why you did not?

A. I tried to explain before.

(Testimony of Stanleigh P. Friedman.)

Q. Maybe the explanation was lost on me. I am sorry.

A. When I saw the letter of transmittal, the copy of the letter of transmittal, a copy of which was directed to Mr. Carlisle and Mr. Schneider, it just passed away and I didn't think enough of it to bring it before the next meeting of the board of directors.

Mr. Levy: May I have Exhibit 4, please?

Q. You read the letter, though, didn't you, carefully?

A. My letter I read.

Q. Did you read Exhibit 4, that amendment?

A. No. No, I didn't.

Q. Did you get it?

A. I didn't get it, no. I only had a copy of the letter of transmittal.

Q. Oh, I see. So that, in other words, what you got was a document that called your attention to the fact that such an amendment had been executed?

A. That is right.

Q. But contents of the amendment were not made known to you, is that correct?

A. Three or four high spots of the amendment, the change in the terms, the extension, and the change in the overhead and the distribution of profits. I think there were [1248] three or four.

Q. Were called to your attention?

A. Points that were called to the attention of the addresses of the letter.

Q. Might I ask you this, Mr. Friedman, to the best of your recollection was the following called

(Testimony of Stanleigh P. Friedman.)

to your attention: —and this is a letter addressed by Warner Bros. to United States Pictures, Warner Bros. saying the following to United States Pictures:

‘You agree that, prior to the commencement of the principal photography of any of the photoplays hereinbefore referred to and about to be produced by you, you will advise us in writing whether the same shall be a remaining original photoplay or an additional photoplay, as hereinbefore referred to.’

Do you recall whether the letter of transmittal advised you of the fact that that was part of the amendment that had been executed?

A. I couldn't say for sure, but I think it did.

Q. You think it did. Did that make any impression on you, if it did?           A. No.

Q. Did you know what was meant by those words?           A. Yes. [1249]

\* \* \* \* \*

Q. No. I am talking of the time that you got the letter of transmittal. Did you regard this as an important change in the relationship between Warner Bros. and United States Pictures?

A. I regarded it sufficiently as putting me on notice to examine the document and I obtained the document from the trust department. [1252]

\* \* \* \* \*

Q. Now we are down to, let us say, about February of 1947, aren't we?           A. '48.



(Testimony of Stanleigh P. Friedman.)

Q. '48. I beg pardon. '48, when you examined this Exhibit 4? A. That is right.

Q. Now, tell me, Mr. Friedman, is there any explanation for not having called a board of directors meeting after you examined it?

A. I gave it to you.

Q. And it was?

A. That it slipped my attention. I don't know that I was the one charged with bringing it before the board, but at any date, it slipped my attention. I didn't arrange to have it brought before the board at the next meeting. I don't know when the next meeting took place, but I didn't arrange it.

Q. Was it ever brought before the board?

A. Yes, it was.

Q. When? A. In 1950.

Q. Three years later, is that right?

A. Two years later.

Q. Well, December 6, 1947 to July 21, 1950?

A. It was received by me on January 18th or January [1253] 28th, somewhere like that, in '48, and the next meeting of the board of directors was on July 17—I beg your pardon. The next time it was brought before the board was July 12, 1950.

\* \* \* \* \*

The Court: The second amendment you refer to, is that Exhibit 7 here in evidence?

Mr. Levy: Yes, your Honor.

Q. For the first time then did the board have before it the question of the amendment to the master contract which had already been in opera-

(Testimony of Stanleigh P. Friedman.)

tion for some three years, two and one-half years, is that correct?

A. I haven't any knowledge of that matter being [1254] brought before the board of directors or any individual director before that time.

Q. Yes. Now, on August the 17th, 1950 the board of directors of Warner Bros. met once again to consider what to do with another amendment which was proposed, is that right?

A. An amendment to extend the time to make three additional pictures.

Mr. Levy: That is number what?

Mr. Williams: Exhibit No. 7.

Mr. Levy: Exhibit No. 7.

The Court: Apparently Exhibit 23 is the minutes of a special meeting of the board of directors of August 17, 1950. Is that what you refer to?

Mr. Levy: Yes, your Honor.

The Court: Do you have Exhibit 23, Mr. Clerk?

The Clerk: Yes, your Honor.

Q. (By Mr. Levy): Mr. Friedman, on the 17th of August, 1950 the board of directors of Warner Bros. met and the following people were present: Albert Warner, Waddill Catchings, S. Carlisle, S. P. Friedman, C. S. Guggenheimer, R. W. Perkins and Samuel Schneider and Morris Wolf. I say they were present. I am reading from Exhibit 23 which so indicates.

A. You are not reading from the waiver of notice, are [1255] you?

A. No, I am not reading from the waiver of

(Testimony of Stanleigh P. Friedman.)

notice. I am reading from the secretary's certification, namely, that a special meeting of the board of directors was held that afternoon of that day and there were present the following people. I ask you, Mr. Friedman, when you walked into that board of directors' meeting on that day were you aware of the fact that Cloak and Dagger had been produced, Pursued had been produced, and My Girl Tisa had been produced?

A. I believe so.

Q. Were you aware of the fact that Cloak and Dagger was a profitable picture, that Pursued was a profitable picture, namely, that there was a profit in it for both Warner Bros. Pictures and United States Pictures which they had divided?

A. I believe I knew that.

Q. Were you similarly aware of the fact that My Girl Tisa had been an unprofitable picture?

A. I was aware of that.

Q. Were you aware of the fact that the picture My Girl Tisa had cost in the neighborhood of a little less than \$2,000,000 to produce and that it had grossed in the neighborhood of \$600,000 or \$700,000 all together? Were you aware of that fact?

A. I don't think so. I don't think I was aware of the [1256] figures.

Q. Were you aware of the fact that it was an expensive picture to produce? A. No, no.

Q. Were you aware of the fact that the grosses on it were extremely disappointing?

A. I was not aware of that.

(Testimony of Stanleigh P. Friedman.)

Q. But you were aware of the fact that the picture had caused a loss to the people who were interested?

A. I was not aware that it had caused a loss, but I was aware of the fact that it was not a successful picture.

Q. And that is as far as your knowledge went?

A. That is as far as I had any knowledge or that was brought to the attention of the directors.

\* \* \* \* \* [1257]

Q. Mr. Friedman, let me put it this way: Let us assume that somebody got up in that meeting of August 17, 1950 and notified you to the following effect: Mr. Friedman, My Girl Tisa has resulted in a loss of \$1,200,000; Warner appears to have lost approximately \$800,000 and some [1264] odd as the result of the production of that picture. If United States Pictures does not produce a successful picture in its fourth venture, namely, a picture which would produce profits so that Warner can recoup out of the fourth picture, the loss that it sustained on the third picture, namely, My Girl Tisa, Warner would be in the position where it would have to look to the fifth picture, if possible, to recoup its loss sustained on the third picture; and if it did not recoup it on the fifth picture, it would have to recoup it out of the sixth picture if it was there to recoup from on the sixth picture; and if after the sixth picture had been produced and Warner had not recouped its \$800,000 loss, then United States Pictures would be obligated to



(Testimony of Stanleigh P. Friedman.)

pay Warner that \$800,000 four years from the first general release of the last picture produced by United States Pictures?

A. Is that a question? Is that a question to me?

Q. If someone had told you that?

A. Is that a question to me or argument?

A. No, no. I am directing a question to you. If somebody had gotten up and made that statement to you at that time and informed you gentlemen on the board of directors that that was the fact, would you have taken that into consideration?

A. Nobody did.

Q. Nobody told you? [1265]

A. Nobody told us that. Nobody raised that question. You are calling upon me to speculate whether my brother would have liked green cheese, and I say I have no brother.

Q. That may be right, Mr. Friedman. Are you aware of the fact, Mr. Friedman, that on August 12, 1952 a further extension of time was granted by Warner Bros. to United States Pictures? A. I am aware of that.

Q. Of the performance of the terms of the basic agreement?

A. I am aware of the existence of the contract you have just referred to, August 12, 1952 I believe it is.

Q. Was there a meeting of the board of directors that preceded or succeeded the signing of that extension? A. I don't recall.

(Testimony of Stanleigh P. Friedman.)

The Court: That is Exhibit?

Mr. Levy: Schedule H attached to the Plaintiff's Exhibit 107 in evidence.

Q. Do you not recall whether there was a meeting or not?

A. I don't recall whether there was a meeting or not.

Q. So far as you know, that agreement was just signed by Mr. Obringer without any authority from the board of directors?

A. I don't know, Mr. Levy. If I did, I would tell [1266] you. [1267]

\* \* \* \* \*

Q. (By Mr. Levy): Do I understand correctly, Mr. Friedman, that after Mr. Freston had prepared Exhibit 1, you authored an addition to it or a change in it? A. I so testified. [1270]

Q. And it was you who inserted the clause that Exhibit 1 in effect shall not become operative until November 7, 1945?

A. I drafted that clause.

\* \* \* \* \*

Q. (By Mr. Levy): Was there any relation between the payment to Mr. Bernhard of his salary up to November 7 and the inclusion of that particular clause by you into that contract?

A. No—I just included it because Mr. Bernhard [1271] requested that this contract become operative at that future time, and it might have been in his mind that he was going to draw the

(Testimony of Stanleigh P. Friedman.)

\$3,000 a week until that time, but I had no awareness of that.

Q. Who requested you to insert that clause in that contract?

A. My recollection is that Mr. Bernhard did.

\* \* \* \* \*

Q. To the best of your recollection, when did you have that conversation with Mr. Bernhard?

A. A week or two before the date of Exhibit 1.

Q. A week or two before September 28, 1945, at which time the Board of Directors approved the contract?

A. Yes. [1272]

Q. In other words, you had had a contract in your possession for a week or two prior to the meeting of September 28?

A. I believe so.

\* \* \* \* \*

Q. Coming back to the meeting of September 25, 1945, the meeting of the Board of Directors, Mr. Bernhard prior to that time had already told you he wanted you to include this November 7 clause in the contract?

A. Prior to the meeting, yes.

Q. Prior to the meeting at which the Board voted him \$78,000 severance pay; is that correct?

A. Yes, that is correct. \* \* \* \* \* [1273]

Q. I believe you testified you had known Milton Sperling since 1932. Did you say that, or did Mr. Freston say that? I have forgotten.

A. I was at his wedding.

(Testimony of Stanleigh P. Friedman.)

Q. You were at his wedding. That was in 1939, wasn't it?

A. I think so. I have forgotten when. Whenever his wedding was, I was there. [1275]

\* \* \* \* \*

SAMUEL SCHNEIDER

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

\* \* \* \* \*

Direct Examination

Q. (By Mr. Williams): Mr. Schneider, you are employed by Warner Bros. Pictures, Inc.?

A. I am.

Q. How long have you been in the employ of that company? A. 30 years.

Q. What is your present capacity with the Company?

A. I am a vice president. I am a director.

Q. How long have you been a vice president?

A. Since 1944. [1298]

Q. How long have you been a director?

A. Since 1944.

Q. Prior to that time, what were your positions in the Company, beginning with when you first started there?

A. I started in the accounting department, and I have gradually worked in practically all of the departments of the Company, and at present I would designate my position as assistant to the president.

Q. Are you active in all phases of the business



(Testimony of Samuel Schneider.)

of Warner Bros. Pictures, Inc. and its subsidiary companies?       A. I am.

Q. Which includes matters of production, distribution, and, when they had theatres, exhibition?

A. Yes.

Q. You had your offices in New York City, I take it?       A. Yes.

Q. In addition to the work you do at New York, do you from time to time go to other places in the country in connection with the business of Warner Bros. Pictures, Inc.?       A. I do.

Q. To what places?

A. I make periodic trips to the West Coast Studios, I would say about two times a year. I have made trips throughout the country to our distribution branches. I [1299] have made many trips to the foreign countries.

Q. All in connection with the business of Warner Bros.?       A. Yes.

Q. In your functions, do you keep in touch with Harry M. Warner, Jack Warner, Mr. Perkins, Mr. Carlisle, Mr. Friedman, Mr. Blumenstock, and Mr. Kalmenson, and the other department heads of Warner Bros. Pictures, Inc. and its subsidiaries?       A. Yes, I do.

Q. Mr. Harry M. Warner is normally on the Coast?       A. Yes.

Q. And has been for a number of years past?

A. Yes.

Q. What is your method of communication with him?

(Testimony of Samuel Schneider.)

A. We constantly talk on the phone. During my trips to the Coast I am practically fifty per cent of my time with him, and during his trips to New York we are constantly discussing business matters.

Q. How about your relations with J. L. Warner?  
A. The same.

Q. In other words, your communication with him on production matters is by telephone, and also you meet him personally on the Coast, or if he happens to be back East?  
A. Yes.

Q. Is that true of the contact with other heads of [1300] Warner Bros. and its subsidiaries?

A. Yes.

Q. In the practice of the Company on matters involving large sums of money and other matters of importance to the Company, when they come up, is there a practice with reference to the discussion of the various features of those matters among the executive officers of the Company?

A. Yes. Any important matter in our company is discussed between the Warners, myself, and the heads of the departments.

Q. Do you have in mind the contract which has been marked in evidence in this case as Exhibit 1, which is the contract dated the 28th of September, 1945, between Warner Bros. and United States Pictures?  
A. Yes.

Q. Are you familiar with that contract?

A. I am.

Q. When did you first learn of the fact that a

(Testimony of Samuel Schneider.)

deal of some sort involving Milton Sperling was in contemplation?

A. I would say at least a year before the signing of the contract. During my trips to the Coast and during Mr. Warner's visits in the East, we discussed the possibility of Milton Sperling being connected with our Company. [1301]

Q. What was the substance of what was said by Mr. Warner and of what was said by you on that subject?

Mr. Levy: May we have some expression from the witness as to the time that he is referring to?

Mr. Williams: I will do that, your Honor.

Q. You said that you first learned of this, or this matter first came to your attention about a year before the contract was signed. How many conversations, as nearly as you can remember, did you have on that subject with Mr. H. M. Warner?

Mr. Levy: May I ask which subject counsel is referring to?

Mr. Williams: The subject we are talking about.

Mr. Levy: May the subject be described a little more definitely?

The Court: You are referring to Exhibit 1?

Mr. Williams: I was referring to the matter of Milton Sperling becoming associated in some manner with Warner Bros., which is the subject I directed the witness' attention to in the previous question.

The Witness: I would say a half a dozen times.

Q. Were those times during the interim between

(Testimony of Samuel Schneider.)

the year before September 28, 1945, and that date?

A. Yes; approximately.

Q. Can you any more closely remember or state at the [1302] present time the date or time of any one or more of those conversations?

A. I know that I visited the Coast at least twice during that year, as I do every other year, and I know Mr. Warner was in New York, and we had long discussions about Milton Sperling as we do about other important matters.

Mr. Warner asked my opinion as to Milton Sperling becoming associated with our company, and in what capacity, and how would he fit into our business; and I gave him my opinion.

Q. What did he say in those conversations and what did you say in those conversations? Be a little more specific, or as specific as your memory will permit.

I want as much of the conversations as you can remember.

Mr. Levy: May it please the court, may we have an expression from the witness as to when this first conversation occurred, or is he about to refer to all of the conversations; in other words, the substance? Is he going to give us the substance of all of his conversations in his one answer, or is he going to give the substance of the first conversation and progressively go on until it comes to the sixth or seventh?

I object to the form of the question on the ground [1303] that the answer will not be suffi-



(Testimony of Samuel Schneider.)

ciently informative of the facts that we are seeking to be brought out. [1304]

Mr. Williams: It will be our misfortune, I suspect, your Honor. I thought I was making it clear that the witness was to answer as to the substance of all these conversations that were being had during that period of time preceding in connection with this contract. If I was not sufficiently clear, I will now ask him.

Q. Are you able to differentiate or state as between these various conversations what was said at one of them and what was said at another?

A. I couldn't possibly say at what date I had a conversation. I can only refer to the visits that I made to the coast and Mr. Warner's visit to the East, during which time we discussed Milton Sperling as well as other matters.

The Court: Are you able to relate the substance of the conversations in the chronological order in which they occurred?

The Witness: I might.

The Court: I take it we are at the first conversation.

Mr. Williams: Yes.

Q. Can you remember what was said the first time you talked with Mr. H. M. Warner on that subject?

A. Without remembering a date, the first conversation with Mr. Warner was: What do I think of Milton Sperling becoming connected with our company in a production capacity? [1305] And in

(Testimony of Samuel Schneider.)

our business the most important thing in our business is production of motion pictures. We are constantly discussing that subject, as we are discussing the subject today.

When Mr. Warner spoke to me about Milton Sperling, I knew prior to his conversations about Mr. Sperling what his business had been, what his experience had been, what pictures he had produced, what work he did at other companies.

After discussing the matter with Mr. Warner I discussed the matter with other executives in our company so I can form a better opinion as to how Mr. Sperling would fit into our company.

Q. Did you answer Mr. Warner at once when he asked you what you thought of having Milton Sperling come in in a productive capacity or production capacity? Did you answer him at once, or did you answer him later?

A. At the beginning we had a general discussion and——

Q. What I am trying to get at is: What did Mr. Warner say to you and what did you say to him?

A. The substance of the conversation was: What do I think of Milton Sperling becoming connected with our company in a production capacity. My answer was, and it would be the same with any other person that he would suggest, and that is that if the person has the ability and the company can work out the proper deal, that it might be the right thing for our company. [1306]

(Testimony of Samuel Schneider.)

And subsequent to that I discussed the matter with other executives of our company, as we usually do in our business, and in subsequent conversations with Mr. Warner and other executives we developed the idea of Mr. Milton Sperling becoming connected with our company in a production capacity.

Q. After you first talked with Mr. Warner with what other executives of the company did you discuss the matter of Mr. Sperling becoming associated in a production capacity?

A. The most important two people that I discussed a matter of this kind would be Jack Warner and our salesmanager, Mr. Kalmenson. And I had many conversations with those two individuals on this matter.

Q. Have you given us the substance of the first conversation you had with Mr. H. M. Warner?

A. Yes.

Q. Can you remember the next time you talked with him on the subject?

A. I couldn't fix any dates, as I said.

Q. I understand that, but can you remember the fact of your having a second conversation on the subject?

A. Yes. I had many conversations and, as I said, they were during my visits to the Coast, during his visits to New York, and on the telephone. And in subsequent conversations we went more deeply into the matter as to how he could be connected with our company, in what capacity. [1307]

(Testimony of Samuel Schneider.)

Q. What was said by Mr. Warner and what was said by you on that subject?

A. Well, I could best summarize Mr. Warner's conversations to me by saying that he suggested that Milton Sperling be connected with our company in a production capacity. At the beginning there were no details as to what capacity that might be, and we discussed the possibility of him coming in as a producer or as assistant to Jack Warner, or in some sort of a setup, as we have in our business, of a producing unit producing pictures which would be distributed through our company. And, as I discussed the matter with other executives in our company, Mr. Jack Warner, Mr. Kalmenson and others, as we went along we developed the plan until it was finally finalized into the form that we made the agreement.

Q. During those conversations did you talk with Milton Sperling about the subject at all?

A. Oh, yes.

Q. When did you first talk to Milton Sperling about it?

A. Well, I could not fix the date but it was sometime prior to the signing of this contract I had a few conversations with him.

Q. Then do you remember about how long it was before the contract was signed?

A. No, I couldn't.

Q. I will ask you this: At the time the contract came up before the Board of Directors for action you were in New York, were you? [1308]



(Testimony of Samuel Schneider.)

A. No.

Q. Were you at that time on the Coast?

A. Yes.

Q. And had you been on the Coast for some time then?

A. About two weeks, I would say.

Q. During——

Mr. Levy: Pardon me. May we have the record clear on the subject? He said "at the time the matter came on for action by the board of directors." You refer to September 28, 1945?

Mr. Williams: Yes.

Q. You so understood, did you, that I was talking about September 28, 1945, when the board acted on this contract?

A. I was not in New York on the day that the contract was approved by the board.

Q. Yes.

A. I know that because I looked it up.

Q. Mr. Schneider, you say you had been on the Coast, by which I suppose you mean you had been at the offices of the company out in Burbank and out here generally in connection with the business of the company for about two weeks prior to that date, September the 28th?

A. Yes.

Q. During that time had you seen Milton Sperling and [1309] talked with him about the matter?

A. I couldn't remember.

Q. You have spoken of having talked with Mr. H. M. Warner and how this subject was developed. Do you know who first suggested, as far as your knowledge goes, who first suggested that the matter

(Testimony of Samuel Schneider.)

of having Milton Sperling connected with the company should be in the form of a separate producing company or separate producing organization to make pictures for Warner's distribution?

A. To the best of my recollection, that was a result of a number of conversations between various people. I couldn't recollect who made the suggestion, specifically.

Q. What persons do you refer to when you say conversations among various people?

A. Harry Warner, Jack Warner, Albert Warner, myself, Mr. Sperling, Mr. Joe Bernhard.

Q. Do you remember when it was that Mr. Joe Bernhard's name first came into the discussion in connection with this matter of Milton Sperling becoming connected with the Warner organization?

A. Well, during my conversations with Mr. Warner Mr. Bernhard's name was also suggested as a possible man to—well, Mr. Bernhard's name was suggested at the time that it was decided that a unit would be set up.

Q. And it was Mr. H. M. Warner who first mentioned Mr. [1310] Bernhard's name to you, was it?

A. I would imagine that it was.

Q. Did you talk with Mr. Bernhard on that subject?      A. Yes.

Q. And how many talks did you have with him?

A. I had a few talks with him in New York.

Q. What was the substance of what you and he said to each other on the subject?

A. Well, Mr. Bernhard and myself, we worked

(Testimony of Samuel Schneider.)

closely together, and he discussed with me the possibilities of being connected with a unit to produce pictures at our studios. He asked my opinion of it. He asked what I thought would be the possibilities of such a unit in the future. I gave him my opinion. I told him.

Q. What did you tell him?

A. I told him that the most important function in our company is the making of motion pictures; that, from my experience, the people, business people who had experience in running theatres, such as Mr. Bernhard had, and an all-around experience as to the public's taste for pictures would be a very important adjunct to a production unit. I base that on the knowledge that in other companies, specifically Paramount, that—

Mr. Levy: May I interrupt at this time? I think the witness is going beyond the purview of the question and [1311] what he is about to testify appears very plainly to be not responsive to the question.

Q. (By Mr. Williams): I do not know how much of this you said to Mr. Bernhard or how much you did not, but confine yourself to what you said to Mr. Bernhard on the subject, Mr. Schneider.

A. I told Mr. Bernhard that the most important function in our business was the production of motion pictures. That the knowledge of a man of his caliber and his experience would be very important in a producing unit. And I told him that there was

(Testimony of Samuel Schneider.)

a very good future in an enterprise of that kind and it would be very good for our business.

Q. You have spoken of your discussions with Harry Warner and Jack Warner and Mr. Sperling and Mr. Bernhard. What was the substance of your discussion with Mr. Kalmenson on this subject?

A. I discussed with Mr. Kalmenson, who is our sales manager, the possibility of a man like Milton Sperling being connected with our company, and then the possibility of a producing unit being set up which would produce pictures for our company. And we discussed between ourselves that it would be a good thing for our company because an independent unit is able to attract outside talent. And Mr. Kalmenson is always willing for a unit of that type to be set up, so that we would obtain motion pictures. [1312]

Q. What did he say with reference to this particular matter of a unit involving Joseph Bernhard and Milton Sperling, as to whether he was favorable or unfavorable to that particular setup?

A. Well, he thought like I did, that with Mr. Sperling's ability and Mr. Bernhard's ability, that they could set up a production unit that would attract talent and would make a caliber of picture which would be beneficial for our company.

Q. What was the situation with reference to what number, or the pictures that you had available at that time? In other words, what I am getting at is: Was Warner Bros. in such a condition that



(Testimony of Samuel Schneider.)

it was desirable that you should have more product than you were getting at the time?

Mr. Levy: I object to the question on the ground that it calls for a conclusion. I have no objection to the witness relating the Warner inventory at the time, though I think the question calls for a conclusion.

Mr. Williams: Inventory is meaningless.

The Court: Overruled. You may cross examine him on the conclusion if you are so advised. You may answer. [1313]

The Witness: The condition in a motion picture company such as ours is always at a point where we need product. It is not a question of whether at that time we had a sufficient number of pictures to release that year. It was a question of how will we get the next batch of pictures, and we are constantly seeking producer or production contracts, stars, directors, stories, and we are always in search for mediums to obtain motion pictures.

Q. At that time how many exchange centers or exchanges did Warner Bros. operate in the United States?      A. About 35.

Q. How many theatres in the United States were served by those exchanges?

A. Over 400.

Q. I am not talking about Warner theatres; I am talking about theatres as a whole.

A. I would say anywhere from fifteen to eighteen thousand.

(Testimony of Samuel Schneider.)

Mr. Levy: May we have a definition of what "as a whole" means?

Mr. Williams: I mean all theatres in which they show licensed pictures.

Mr. Levy: You mean theatres other than theatres owned by Warner Bros. Pictures?

Mr. Williams: Certainly; that is what I am talking [1314] about.

Q. You understood me, didn't you, that I was talking about theatres in which Warner Bros. licensed pictures?           A. Yes.

Q. Including their own theatres?           A. Yes.

Q. How many theatres in the United States were owned by Warner Bros. at that time?

A. Over 400.

Q. In foreign countries did Warner Bros. have distribution organizations?           A. Yes.

Q. In how many foreign countries, approximately?           A. Over 40.

Q. In England or in the United Kingdom, specifically, did Warner have additional distribution organization? Did it have an interest in theatres?

A. Yes; we own 37½ per cent of a circuit of theatres, over 400.

Q. In the United Kingdom?           A. Yes.

Q. Did Warner own theatres in any other countries outside of the United States and the United Kingdom?

A. At that time we had a few. [1315]

Q. I am referring always, Mr. Schneider, to before the 2nd of March of this year, before there

(Testimony of Samuel Schneider.)

was a complete disposition of Warner theatres under a decree of the Federal Court.      A. Yes.

Q. And this situation, concerning which you have been testifying, is the situation that existed in 1945?      A. Yes.

Q. Prior to September 28, 1945, as has been shown here in this case in evidence, Warner Bros. had made several production-distribution contracts with several different organizations.

Were you aware of that fact at that time?

A. Yes.

Q. Were you aware of the fact that they had first made the Cosmopolitan contract back in 1936?

A. Yes.

Q. And later the Capra and the Bette Davis and the other contracts that have been shown in evidence here?      A. Yes.

Q. Was it at that time your opinion that the making of production-distribution contracts as a method of obtaining pictures was of advantage to Warner Bros.?

Mr. Levy: May we have an expression from Mr. Williams as to what he means by "at that time," specifically? [1316]

Mr. Williams: The time I have been talking about.

Mr. Levy: Namely?

Mr. Williams: September, 1945.

The Witness: Every contract that we ever went into, we did it with the knowledge, or we did it

(Testimony of Samuel Schneider.)

with the thought that it would be to the benefit of the Company.

Q. (By Mr. Williams): That is not answering my particular question.

My question was: In September, 1945, was it your then opinion that the making of contracts with independent producers, that method of obtaining product for distribution by your company was of advantage to Warner Bros., that type of contract?

A. Yes.

Q. In addition to talking this matter of the proposed agreement over with Sperling and Bernhard, with M. H. Warner and the other persons you have mentioned, did you talk over the matter with Mr. Friedman?

A. Yes.

Q. With Mr. Perkins?

A. I might have.

Q. Did you discuss the matter with Mr. Carlisle?

A. Yes.

Q. Mr. Carlisle is the head of the accounting department, is he not? [1317]

A. Yes; he is the controller.

Q. Do you remember any other persons with whom you discussed the matter?

A. I might have discussed the matter with Mr. Freston. I am not sure, though.

Mr. Levy: May we have some indication of the time that the witness has referred to, when he discussed the matter with Mr. Freston?

Mr. Williams: If the witness can remember.



(Testimony of Samuel Schneider.)

The Witness: Prior to the signing of the contract.

Q. Can you fix it any more definitely than that?

A. No. I might have discussed it with other people of which I am not sure, like Mr. Trilling in our studio, and Mr. Obringer.

Q. Mr. Trilling has what position?

A. He is the assistant to Jack Warner.

Q. And Mr. Obringer?

A. He is in our legal department.

Q. Is it your recollection you did discuss it with those men? A. I wouldn't be sure.

Mr. Levy: When you say "it," was "it" referred to in the question concerning the desirability of having Sperling come into the organization?

Mr. Williams: It refers to what I was asking about, [1318] the deal with Sperling and Bernhard to make pictures.

Mr. Levy: I see.

Q. (By Mr. Williams): Mr. Schneider, did you see the contract that was finally signed, or what purported to be a draft of it, at any time before it was signed, that is, the actual contract itself?

A. I couldn't recall.

Q. What was your understanding at that time as to what the terms of the contract were?

A. I knew——

Mr. Levy: May we have the time again fixed?

Mr. Williams: I just got through saying "at the time of the signing."

(Testimony of Samuel Schneider.)

Mr. Levy: At the time of the signing?

Mr. Williams: Yes; at the time of the signing.  
I just got through saying it.

Do I have to keep saying it in every sentence?

Mr. Levy: No; sorry.

The Witness: I was familiar with all the terms, of course, prior to the signing.

Q. (By Mr. Williams): State to the best of your recollection what you now remember the terms were.

Mr. Levy: I move to strike the answer of the witness on the ground it is a conclusion.

Well, I will withdraw the motion. [1319]

Q. (By Mr. Williams): State, as nearly as you can now remember, what you then knew in detail as to what the terms of the contract were.

A. The final terms of the contract, as I remember them, and as I know them now, were that United States Pictures would produce six pictures in a period of three years; Warner Bros. Pictures would put up 50 per cent of the money, United States Pictures would put up 50 per cent of the money; Warner Bros. Pictures would receive 20 per cent for domestic distribution, 25 per cent for distribution in the United Kingdom, and a schedule of distribution charges in the other foreign countries; that Warner Bros. would charge to the cost of production 30 per cent of its production facilities, and 18 per cent of the facilities furnished by United States Pictures; which formula was arrived at by Price, Waterhouse.

(Testimony of Samuel Schneider.)

Warner Bros. Pictures would advance the cost of prints, advertising and other charges.

That when the pictures were distributed, we would deduct our distribution charges and the other charges that I mention.

The next money would be paid toward the United States Pictures' 50 per cent advance for production. The next money we would deduct as our advance for production, and the balance would be divided 50-50. [1320]

Also that United States Pictures would endeavor to obtain stories, personalities, without which they couldn't produce pictures; that we could recoup any losses from subsequent pictures, and in the event there was a loss not recouped, that at the end of four years after the release date of the final picture, United States Pictures would pay us the difference.

Q. Have you now related what you remember as to your then knowledge of the contract?

A. Yes.

Q. Was it your opinion at that time that that contract was favorable to the business interests of Warner Bros.?

A. Yes.

Q. What advantages, if any, are there to a studio like Warner Bros. having an independent producing unit within the studio?

A. The greatest advantage, as we look on it, is that they are able to obtain the services of stars, directors, writers; they are able to obtain stories. Warner Bros. are always in a favorable position

(Testimony of Samuel Schneider.)

with a contract of that type because they absorb part of our overhead. We obtain the distribution charges. We also use other facilities of our organization, such as checking theatres, and our prints which are furnished by [1321] our laboratory, so that we absorb the overhead charges in our laboratory. The use of our music and our music companies, and also the ability to obtain pictures, which we are always trying to get, playing the pictures in our own theatres, which gives us a profit in our theatres. And the all-around benefits of a unit of that type are very large.

Q. Mr. Schneider, since the making of the contract which has been marked Exhibit 1 in this case, have you, yourself, kept track of how the operation of it has worked out? A. Yes.

Q. Have you observed what pictures have been produced and the results generally from those pictures?

A. Yes; that is one of my important functions with the company.

Q. In the performance of that function, you have kept your eye on what has happened as a result of making this contract? A. Yes.

Q. What pictures have been produced?

A. They produced eight pictures and are producing a ninth.

Q. And are producing a ninth? A. Yes.

Q. Do you know, generally, about what the financial [1322] results of the production of those pictures have been? A. Yes.



(Testimony of Samuel Schneider.)

Q. Will you state what they are from the viewpoint of Warner Bros.? A. Yes.

Mr. Levy: The question is objected to on the ground it calls for the conclusion of the witness.

Mr. Williams: No; it is not. It is calling for the knowledge of this man, whose business it is to keep track of these matters.

Mr. Levy: You mean he is to give us his knowledge of this whole transaction in one breath?

Mr. Williams: Yes.

The Court: The objection is overruled. You can cross examine as fully as you wish, if so advised.

You may answer.

The Witness: There were eight pictures produced by United States Pictures. Seven of them have either shown a profit or will show a profit, based on the terms of the contract.

The over-all profit of the seven pictures, I would say, would be about three and a half million.

The loss on the one picture, *My Girl Tisa*, a million two, bring the net profit approximately over two million dollars. [1323]

The Court: Is that the net profit to the corporation, Warner Bros.?

The Witness: No, the net profit of the pictures entirely, about two million dollars. Under the terms of our contract, we would receive about a million and a half dollars of that profit and United States Pictures about half a million dollars.

Besides that, our company will receive between

(Testimony of Samuel Schneider.)

five and a half million and six million dollars in distribution charges.

We will receive over three and a half million overhead charges of the studio.

The profits in our own theatres would be upward of a million dollars.

So that the total benefits to our company, in my opinion, would be in excess of eleven million dollars.

Mr. Levy: May I move the answer of the witness be stricken, if the court please, on the ground it is a conclusion of the witness; is incompetent, irrelevant, and immaterial to establish the fact, namely, the profit that Warner Bros. has made over-all, the profit that Warner Bros. has made as the result of overhead, as the witness expressed it, and the profit Warner Bros. has made as the result of exhibition, as the witness has expressed it; and in every respect in which the witness [1324] used the word "profit."

I respectfully submit his whole answer is a conclusion on the part of the witness, and is not the best evidence in the case.

Mr. Williams: We resist the motion, your Honor.

The Court: Motion denied.

Q. (By Mr. Williams): Mr. Schneider, I direct your attention to the fact that there was an amendment to the United States Pictures contract, the basic agreement, and, incidentally, in questioning you further, in order to save ourselves time and words, when I speak hereafter of the basic agree-

(Testimony of Samuel Schneider.)

ment I will mean the agreement dated September 28, 1945, between United States Pictures and Warner Bros.

The Court: Exhibit 1 here.

Mr. Williams: Exhibit 1 in this case.

Q. Now, are you aware of the fact that there was an amendment dated May 20, 1946, which is marked Exhibit 3 in this case, and which had to do with the Hemisphere Pictures? A. Yes.

Q. Prior to the making of that contract, did you know anything about it? A. I did.

Q. From whom did you first learn of that matter? [1325]

A. From Milton Sperling.

Q. Were you in New York or California, or where?

A. I couldn't remember. I recall I had a long telephone conversation with Mr. Sperling.

Q. What was the substance of the conversation you had with Mr. Sperling on that subject?

A. He told me that there was a possibility of obtaining the story Pursued, written by Niven Busch, starring his wife, Teresa Wright, and he thought that this would be a good picture to make, that Jack Warner thought it was a good property, but in order to obtain that project that he would have to make a deal with them on some sort of a percentage basis.

Q. Did he tell you further what the percentage was or what the details of the basis were?

(Testimony of Samuel Schneider.)

A. Yes; he discussed approximately some of the details.

Q. Tell us, as well as you can remember, what details he gave you.

A. They would want a percentage of the profits, and I don't recall exactly what the details might have been, but I do know what the final deal was after discussions.

Q. We will get to that later. What did you say in response to his statement to you that some sort of a [1326] profit-sharing deal would have to be made?

A. I told him if a deal could be worked out, that we would feel would be beneficial for our company, "By all means make it."

Q. Thereafter, did you have further discussions with him or with any other person about this proposed Hemisphere deal before it was finally consummated?      A. Yes.

Q. With whom did you discuss it?

A. I discussed it with Jack Warner, Milton Sperling, and the sales manager.

Q. That is Mr. Kalmenson?      A. Yes.

Q. What was the substance of the conversation you had with Mr. Jack Warner on the subject?

A. What did he think of the property Pursued, starring Teresa Wright.

Q. What did he say, is what I am asking you.

A. He thought it was a very good story and could be made into a good picture.



(Testimony of Samuel Schneider.)

Q. The substance of your further conversation with Milton Sperling was what?

A. At the time that he worked out the final details or possible deal——

Q. No; what did he say to you? [1327]

A. He told me the final terms.

Q. What did he tell you?

A. He told me that the profit would have to be split one-third to those people, one-third to United States Pictures, and one-third to Warner Bros.

Mr. Levy: By "those people," does the witness mean Niven Busch and Teresa Wright?

The Witness: Yes.

Q. (By Mr. Williams): What else did he tell you?

A. He told me in endeavoring to work out the terms, they worked out certain terms, and United States Pictures would charge this unit, and whatever the difference would be between what we charged United States Pictures and they charged the other company would be split 50-50 between us.

Mr. Levy: Does the witness mean Hemisphere when he says "the other company"?

Mr. Williams: Of course he does.

Mr. Levy: I just want the record clear.

The Court: Address your remarks to the court, gentlemen, and let us have no more bickering between you.

Mr. Levy: May I ask at this point, in order to clear the record, that the witness, in designating this other person, is speaking of Hemisphere, so

(Testimony of Samuel Schneider.)

we will be clear on the subject? Then I won't have to cross examine on the [1328] subject, if the witness will actually say so-and-so. That is the reason for the interruption.

Q. (By Mr. Williams): Had you completed your answer?

A. He told me that they would charge—

The Court: You see, "they" 'is very indefinite.

The Witness: Yes. Milton Sperling told me that United States Pictures would charge Hemisphere 25 per cent for domestic distribution, 30 per cent in Great Britain, and the same schedule of percentages in the foreign countries as we were charging United States Pictures, and they would charge them a larger amount for the overhead of the studio, which I think was 45 per cent.

Then I proceeded to calculate as to what that would mean to our company, the fact that we would get  $22\frac{1}{2}$  per cent domestic and the  $27\frac{1}{2}$  per cent in Great Britain and half of the overhead charges between the 30 and 45 per cent, and by a quick calculation I told Milton Sperling that those terms were as satisfactory to Warner Bros. Pictures as if the picture was made by United States Pictures.

Q. (By Mr. Williams): What was the substance of your conversation with Mr. Kalmenson on the subject of this proposed Hemisphere deal?

A. I merely discussed with Mr. Kalmenson the possibility of the company obtaining a picture called *Pursued*, written by Niven Busch and star-

(Testimony of Samuel Schneider.)

ring Teresa Wright, [1329] and he thought it was a good thing to get that picture.

Q. What was the reason you discussed these things with Mr. Kalmenson?

A. Mr. Kalmenson is our sales manager, who is constantly traveling throughout the United States. He knows the pulse of the public, and he is constantly talking with exhibitors, and he is best qualified in our company to pass an opinion as to whether a certain picture, starring certain people, would be good box office.

Q. What was your opinion when the contract was finally presented to the Board of Directors; when the United States Pictures deal was finally presented to the Board of Directors, what was your opinion as to whether or not it was a contract for the benefit of Warner Bros.?

A. Do you mean the——?

Q. The Hemisphere amendment to the basic agreement, and by the Hemisphere amendment I am referring to Exhibit 3 in this case.

A. I thought it was satisfactory.

Q. You were present at the meeting of the Board which approved that contract, were you not, on June 18, 1946?

A. I wouldn't remember.

Q. You don't remember?

A. No. If the records show I was there—but I [1330] couldn't remember.

Q. At any rate, whether you remember being

(Testimony of Samuel Schneider.)

there or not, you personally did approve the contract?       A. Yes.

Q. I call your attention to the fact that under date of July 21, 1950, there was another amended or supplemental agreement executed between United States Pictures and Warner Bros. which has been marked in evidence in this case as Exhibit 7.

The Court: Do you wish the document placed in front of the witness?

Mr. Williams: Yes. May the document be placed in front of the witness?

The Witness: I am familiar with the document.

The Clerk: Did you say No. 7, Mr. Williams?

Mr. Williams: I think, if your Honor please, I will withdraw that at this time and go to the December 6 agreement, which is Exhibit 4.

In looking here, I passed up that particular exhibit.

May the witness have placed before him Exhibit 4?

Q. Mr. Schneider, I call your attention to Plaintiff's Exhibit 4 in this case, an agreement in the form of a letter dated December 6, 1947, and which is the agreement which we referred to here yesterday, and one which provides for additional pictures, and extends the [1331] time for the making of original pictures.

Prior to the execution of that agreement, did you have any conversation with any person or persons concerning the matter of deferring the making of further pictures under the basic agreement and the



(Testimony of Samuel Schneider.)

matter of having an arrangement for the making of additional pictures?      A. Yes.

Q. With whom did you first discuss that subject?

A. I wouldn't remember who I first discussed it with, but I know I discussed it with Milton Sperling, Jack Warner, Harry Warner, Albert Warner, and our sales manager.

Q. You cannot remember who it was that you first discussed it with?      A. No.

Q. Can you tell us what the substance of the conversations you had with Milton Sperling was?

Mr. Levy: May we have the time, your Honor, approximately fixed?

Q. (By Mr. Williams): If you can do so, fix the time, Mr. Schneider.

A. It was prior to the signing of the contract. I couldn't possibly fix the exact time. I would say maybe a few months before.

Q. You did then talk with Milton Sperling?

A. Yes. [1332]

Q. Did you talk with him more than once on the subject?      A. Yes.

Q. About how many times did you discuss the matter of this proposed contract with Milton Sperling before the contract was executed?

A. It was more than once.

Q. Can you give us the substance of what was said by Milton Sperling and what was said by you in those conversations?

A. I recall that he asked my opinion as to the

(Testimony of Samuel Schneider.)

advisability of continuing on the basis of the original contract, which called for the borrowing of money at the bank. In view of the falling box office receipts in the theatres, he expressed a reluctance about making the next picture under that method, and borrowing money from the bank. [1333]

Q. What did you say to that?

A. I advised him about the condition of the picture business and told him that box office receipts were falling and that there was a risk in borrowing money from the bank at that moment and making a picture. It was a general conversation between the two.

Q. Was anything said at that time on the subject of making pictures for Warner on a different basis?

A. Yes.

Q. What was said and by whom?

A. Well, specifically, with Milton Sperling. He desired to make pictures and the company wanted him to go ahead and make pictures. He had stories prepared. He had an organization. We wanted pictures and we discussed generally the possibility of making pictures by United States Pictures on a different basis.

Q. Was anything said between you as to what that different basis would be?

A. We discussed generally a possible modification of the contract.

Q. Did you go into any detail as to who would finance the pictures?

A. Well, I couldn't say that it was at the first

(Testimony of Samuel Schneider.)

conversation with Mr. Milton Sperling but after discussing the matter with other people in our organization, I was [1334] prepared and did talk to Milton Sperling about a modification of the contract under another basis.

Q. All right. Now, let's just leave Mr. Sperling for the moment. After you first talked with Mr. Sperling with whom did you discuss the subject of a possible change in the contract?

A. With Jack Warner, with Harry Warner, with Mr. Kalmenson, with Mr. Albert Warner, with Mr. Carlisle.

Q. What was the substance of your conversation or conversations with Harry Warner on that subject?

A. Along the same line and about the——

Q. Just tell us as nearly as you can remember what he said and what you said.

A. About the fact that, with the falling box office receipts, the risk involved in United States Pictures borrowing 50 per cent of the production cost of a picture from a bank at that time, our opinion was at that time that box office receipts would fall more drastically and that the condition of business would be even worse than subsequently the case was. And I discussed with Mr. Harry Warner that we were discussing a different form of a contract.

Q. What did he have to say as to that?

A. Well, he didn't participate in any talk about what terms we could fix. Usually in a case of that

(Testimony of Samuel Schneider.)

kind Mr. Warner relies on the other executives of the company to come [1335] up with terms and conditions of a contract that would be satisfactory to our company.

Mr. Levy: May I move to strike the latter part of the witness' answer?

Mr. Williams: We think it is within the issues, your Honor. The fact it is not responsive to the particular question——

Mr. Levy: It is not responsive. He was asked what he discussed with Mr. Warner, what did Mr. Warner say to him in substance and what did he say to Mr. Warner. I have no objection to the rest of the answer, but the last part of the answer is a departure from the point of the question.

Mr. Williams: We admit that, your Honor, but it is admissible as being relevant to the issues involved.

The Court: It is a statement as to proof.

Mr. Levy: I do not press the objection.

The Court: Motion denied.

Q. (By Mr. Williams): Where were you? Do you remember?           A. Yes.

Q. Proceed.

A. In a matter of this kind when there is a discussion between the executives, Harry Warner would leave the terms, the detail of the working out of a contract to his executives.

Q. In this particular case, then, as I take it from your testimony, Mr. Harry Warner did not



(Testimony of Samuel Schneider.)

discuss with you any [1336] of the details of this proposed change?           A. I don't think so.

Q. Yes.

A. I might have advised him about the final contract.

Q. With reference to your conversation with Jack Warner, you talked this matter over with him, that is, the matter of a proposed different arrangement for the making of additional pictures?

A. Yes.

Q. What was the substance of the conversation you had with Jack Warner? What did you say and what did he say?

A. I discussed with Jack Warner the point that Milton Sperling raised about the advisability of borrowing money at that time and the advisability of United States Pictures going ahead and making pictures on a different basis. Jack was satisfied to do that if the right deal could be worked out.

Q. And you say you talked it over with Mr. Kalmenson?           A. Yes.

Q. What was the substance of your conversation with Mr. Kalmenson?

A. Merely that we were trying to work out a deal with United States Pictures whereby they would continue to produce pictures on a different basis. Mr. Kalmenson would not be interested in the various terms under the contract, other than the fact that they would produce pictures and the distribution [1337] terms.

(Testimony of Samuel Schneider.)

Q. Did you discuss the distribution terms with him?      A. Yes.

Q. What did you say to him and what did he say to you with reference to distribution terms under the proposed agreement?

A. I discussed that with Mr. Kalmenson after we had arrived at some sort of a basis.

Q. And what was the substance of that conversation?

A. I advised Mr. Kalmenson that under a new contract we were proposing that the distribution terms domestic would be 25 per cent instead of 20, that the United Kingdom terms would be 30 instead of 25, and that we would receive the various schedule of percentage throughout the world in other countries.

Q. Now, having this——

Mr. Levy: May it please the court the answer of the witness who said: "I advised Mr. Kalmenson" of these facts, namely, the distribution percentages, after we had arrived at the terms, may the witness at this time state, in order to save time on cross examination, whom he meant by "we"?

The Court: Yes.

A. Mr. Sperling, myself, and after having discussed the matter with Jack Warner or Harry Warner.

Mr. Williams: I was going to have that. [1338]

Q. After you had discussed the matter with Harry and Jack Warner and other persons you mentioned did you have a further conversation with

(Testimony of Samuel Schneider.)

Milton Sperling at which a deal was agreed upon?

A. Yes.

Q. Just state the substance of that conversation.

A. We discussed the final terms of a deal, which were that Warner Bros. Pictures would advance 100 per cent of the production cost; that under the new deal it would not be — under the new deal United States Pictures would use more of the facilities of Warner Bros. Pictures' studios; that the overhead charge would be our regular overhead charge which we charge to all pictures; and that the distribution terms would be 25 per cent domestic and 30 per cent in Great Britain and various schedule in other foreign countries; and that we would still advance the cost of prints, advertising and other charges, and the net profits would be divided 80 per cent to Warner Bros. Pictures and 20 per cent to United States Pictures.

And also during the conversation we discussed the fact that we would keep the profits of the additional pictures to recoup any losses on any previous pictures under our original contract.

The Court: We will take the morning recess at this time.

(Short recess.) [1339]

Q. (By Mr. Williams): I don't remember whether you had testified, Mr. Schneider, but do you remember whether you were present at the time that—I withdraw that question.

At the time that you gave your approval to the terms of what became the agreement of December

(Testimony of Samuel Schneider.)

6, 1947, Exhibit 4 in this case, was it your opinion at that time that that was for the benefit of Warner Bros. Pictures, Inc.?           A. Yes.

Q. I now call your attention to Exhibit No. 7 in this case. The clerk is handing you the exhibit, which you will observe is an agreement dated July 21, 1950 between United States Pictures and Warner Bros. Prior to the time that that agreement was executed were you aware of the fact that such an agreement was in contemplation and was being discussed?           A. Yes.

Q. Did you discuss it with any person or persons?           A. Yes.

Q. With whom did you discuss the matter of this proposed agreement?

A. It was practically the same procedure as the previous contract; with Milton Sperling, with Jack Warner. There wasn't too much discussion because it was merely another postponement of the making of the original pictures and the addition of three additional pictures. So the conversations were practically along the same line. [1340]

Q. Do you remember in connection with that talking to Mr. Obringer about it?

A. I might have.

Q. Do you remember whether or not you instructed Mr. Obringer to draw a contract providing for this extension of time and additional pictures?

A. I might have instructed him.

Q. Do you have any recollection of it now as to whether you did or did not?



(Testimony of Samuel Schneider.)

A. No, I don't.

Q. You were, however, aware of the fact that such a contract was to be drawn, and did you approve of it?      A. Yes.

Q. Did any of the persons with whom you discussed the matter voice any disapproval of this additional contract Exhibit 7?

A. Not that I recall.

Mr. Levy: Pardon me, may it please the court. May the witness at this time name the persons that are referred to in the previous question?

Q. (By Mr. Williams): Just give the names of the persons to whom you talked about this contract. You have named them once.

A. Mr. Sperling.

Q. Any other person? [1341]

A. Jack Warner, our sales manager, but I couldn't recall specifically whether I spoke to each one that I named in the previous contract.

Q. You do remember these three?

A. Oh, yes.

Q. That is, Mr. Sperling, Jack Warner, and Mr. Kalmenson?      A. Yes.

Q. And, as I understand, you don't remember whether you did or did not instruct Mr. Obringer to draw the additional agreement?

A. I don't remember.

Q. At the time that you discussed this matter did you believe that it was a good thing for Warner Bros., it was for the benefit of Warner Bros. that those terms should be additionally extended

(Testimony of Samuel Schneider.)

and provision should be made for the making of additional pictures?       A. Yes.

Q. Were you present at the meeting of the board of directors when the contract of July 21, 1950 was presented to the board for approval?

A. I don't remember.

Q. You do not remember whether you were or were not before the board?

A. That is correct. [1342]

Q. But whether you remember being before the Board or not, you did favor the contract?

A. Yes.

Q. There has been received in evidence in this case a contract dated August 12, 1952, which is Exhibit H, attached to Exhibit 107. I think without the necessity of bring that out, I can fully describe it. That is the agreement which provides for the making of two additional pictures and extends the time for making the original pictures under the basic agreement. Are you familiar with that?

A. Yes.

Q. Was that matter discussed with you before the contract was made?

A. Yes.

Q. With whom did you discuss it?

A. I discussed it with Milton Sperling.

Q. And with any other person or persons?

A. With Jack Warner.

Q. What was the substance of the conversation with Milton Sperling on that subject?

A. Just merely the advisability of continuing

(Testimony of Samuel Schneider.)

the production of motion pictures under the same terms as the additional pictures.

Q. What did he say and what did you say on that [1343] subject?

A. He merely would discuss with me what was my opinion of making a picture at that time under the original agreement and borrowing money at the bank. We had a general discussion about conditions in the business and the risk to be taken at that time in the borrowing of money from the bank, and Warner Bros. desiring to continue the receiving of pictures from United States Pictures, if it was possible for them to produce them; and we agreed to continue the contract.

Q. Did you think at that time that was for Warner Bros.' benefit?      A. Yes.

Q. Did you discuss the matter with Jack Warner also?      A. Yes.

Q. What was the substance of that discussion?

A. Any matter of this type I would discuss with Jack Warner, because we would discuss the properties that United States Pictures has; I would ask Jack Warner what was his opinion of whether United States Pictures could in the next year or so make a picture or two, what does he think of the story that United States Pictures was preparing, and I would obtain from him the opinion as to whether the United States Pictures were in a position to produce additional pictures for our company to [1344] distribute.

Q. What did he say as to that?

(Testimony of Samuel Schneider.)

A. He thought that, after describing the different stories that they were working on and who would be in the cast, he agreed we should extend it so that they could proceed with production.

Q. Do you remember the names of any of the particular pictures he discussed at that time that were in preparation?           A. Yes.

Q. What pictures?

A. I remember specifically that we discussed the picture *Three Secrets*. I remember discussing the picture *Distant Drums*, which would be made in Florida with Gary Cooper. We discussed the picture *The Enforcer*, which was based on the story *Murder, Incorporated*; and Jack always knew the properties that United States Pictures had, and whether or not it was worth while for them to proceed with production.

Mr. Levy: Pardon me, Mr. Williams. May it please the court, I think there is a slight confusion in the record.

Mr. Williams: We will take care of the confusion in the record, Mr. Levy.

Mr. Levy: May I indicate what I thought the confusion is to your Honor? [1345]

The Court: You may.

Mr. Levy: Mr. Williams' question to the witness was to the effect, or was designed to bring out from the witness what he had discussed with Milton Sperling at or about August 12, 1952, and I believe the witness misunderstood him, because he went back to the years 1948, 1949 and 1950.



(Testimony of Samuel Schneider.)

I say that creates a confusion in the record; and, to save time on asking a lot of preliminary questions on cross examination on this particular subject, I thought it might be cleared up at this point.

Mr. Williams: That is what I was just about to do, except that counsel is also in error. I was not asking the witness about a conversation with Milton Sperling; I was asking the witness about a conversation with Jack Warner.

Q. The conversation I am now asking you about, Mr. Schneider, is a conversation in August of 1952 when this last extension was made, and the question was, Do you remember now what picture or pictures were discussed as being in preparation at that time?

A. My former answer was based on the many conversations I had with Jack Warner. In 1952 we specifically discussed the very picture he is working on now, *Blowing Wild*; the story we discussed, [1346] *Retreat, Hell*, which I don't recall whether it was at the time of this renewal of the contract, but I remember specifically discussing with Jack Warner the story *Retreat, Hell*, which was based upon events in Korea, and which we were very anxious to get. We thought it was a very timely subject.

Q. Are you familiar with the fact that as late as February of this year an additional amendment of the contract was made providing for the making of the picture *Blowing Wild* in Mexico, instead of at the Warner Studios? A. Yes, sir.

(Testimony of Samuel Schneider.)

Q. Were you familiar with the fact that contract was in process of being negotiated while it was being negotiated? A. Yes.

Q. Did you approve of that contract as being beneficial to Warner Bros.? A. Yes.

Mr. Levy: May it please the court, I did not get Mr. Williams' question just before the last one. The witness answered "Yes," and the next question came in before I could interrupt. May I call upon the reporter to read the question before the last one Mr. Williams put to the witness?

The Court: Will you do so, Mr. Reporter?

(Record read.)

Mr. Levy: The last question is rather confusing, your Honor. We don't know whether it points to terms that were being discussed or the contract that was ultimately negotiated, and I object to it on the ground it is improper in form.

The Court: Do you make a motion that the answer be stricken?

Mr. Levy: I make a motion the answer be stricken, may it please the court.

The Court: The motion is granted, and the objection is sustained.

Q. (By Mr. Williams): Are you familiar with the terms of the agreement as finally drafted?

A. Yes.

Q. The agreement of February 11, 1953?

A. Yes.

Q. Did you approve of that agreement?

A. Yes.

(Testimony of Samuel Schneider.)

Q. In your opinion is that agreement for the benefit of Warner Bros.? A. Yes.

Q. Let me ask you whether in your observation and experience in the motion picture business, whether a producer who produces seven pictures which are [1348] financially successful, box office successes, out of eight pictures produced, whether that is a good average result for a producer?

Mr. Levy: I object to the question on the grounds it is incompetent, irrelevant and immaterial to the issues of the case, and particularly to the issues that are being tried before your Honor at this point.

Mr. Williams: We have a theory on the matter.

The Court: Is the purport of your question whether in that particular industry a producer who has seven financial successes out of eight attempts is considered successful or unsuccessful?

Mr. Williams: Yes.

The Court: Do you object to the question in that form?

Mr. Levy: No, your Honor, I don't.

Q. (By Mr. Williams): Will you answer the question?

The Court: I think the preceding question was objectionable, but you did not object to it. The preceding question called for the ultimate fact in issue here, whether the contract was beneficial to Warner Bros. Pictures, Inc.

Mr. Levy: He was referring to the last contract?

The Court: Yes.

Mr. Levy: This is the August 12 contract——

(Testimony of Samuel Schneider.)

The Court: I am not inviting you to assert it.

Mr. Levy: No, your Honor; I didn't object to it. I want to be very forthright and frank with your Honor that I felt I would take care of it on cross examination.

The Court: I did not imply any criticism. I interpret such a question as meaning, "Did you intend it to be beneficial to Warner Bros.?"

Mr. Levy: That is what I really thought the question was directed to.

The Court: Very well.

The Witness: Shall I answer?

Mr. Williams: Yes.

The Witness: Based upon my experience in the motion picture business and based on the knowledge I have of pictures produced by other companies as well as our own companies, seven financial successes out of eight is very excellent.

Mr. Levy: Now, if Honor please, I move to strike the answer upon this ground: that it assumes a state of facts not in evidence.

The Court: What facts does it assume that are not in evidence?

Mr. Levy: It assumes the following facts not in evidence, namely, that the picture South of St. Louis was a success, that the picture Retreat, Hell, was a success, that the picture Distant Drums has been a financial success, [1350] whereas in the answer to the interrogatories it is indicated clearly and concisely that some of these pictures have not as yet recouped their cost, and there is no evidence



(Testimony of Samuel Schneider.)

now in this record which directly, indirectly, or my implication establishes the fact that seven out of eight pictures that have been produced by the defendant United States Pictures have been or are financial successes.

The Court: Of course, that is a matter of degree. It may be that at a certain stage in the process of recoupment, people who are experienced in the industry, in the business, would term the project a financial success, based upon past experience.

This witness has testified, as I understand his testimony, that he views the seven out of eight photoplays produced by United States Pictures under this arrangement to be financial successes. As he views them, would not the actual figures go to the weight of his testimony rather than to the competency?

Mr. Levy: Again I withdraw the objection.

The Court: You may answer.

The Witness: There was an answer.

Mr. Williams: There was a motion to strike.

Mr. Levy: Then I withdraw my motion to strike.

The Court: Very well.

The Witness: May I explain what I mean by financial [1351] success?

Q. (By Mr. Williams): Yes; please do.

A. Based upon the knowledge I have and the figures I studied before I left New York, seven of these pictures based on the terms of the contract will recoup, the negative cost will recoup all other

(Testimony of Samuel Schneider.)

costs of distribution charges, and will show a profit after that.

The Court: I take it that is based upon your experience with pictures in the past and based upon certain factors, such as how long it has been since they were first released?

The Witness: As a matter of fact, there are only two pictures, *Distant Drums* and *Retreat, Hell*, that have additional income to come in, and taking an approximate amount of the income that will come in, mostly from foreign countries, we are pretty sure about the ultimate result of those two pictures.

The Court: At the present stage in the process of exploitation, you consider that ultimately they will show a profit? That is upon what you base the characterization or measure of success?

The Witness: Yes; and there is very little left to recoup, to obtain that profit.

Q. (By Mr. Williams): Mr. Schneider, you have heretofore testified that you stated in conversation with Mr. [1352] Sperling that you did not think it advisable for United States Pictures to borrow money in the condition of the motion picture industry in 1947 to make additional pictures. What is the fact with reference to Warner Bros. itself as to whether it was to the business advantage or disadvantage of Warner Bros. to produce pictures or finance the production of pictures at that time?

Mr. Levy: I object to the question as improper in form and compound.

The Court: The objection is overruled. The ques-

(Testimony of Samuel Schneider.)

tion, as I understand it, calls for why the Warner Bros. Pictures, Inc., the corporation, was in any different position with respect to borrowing money than the United States Pictures was at that time.

Mr. Williams: Yes.

The Witness: First, I don't think I said I advised him not to borrow money. We discussed the conditions in the business, and we both talked about the fact that it might be inadvisable for United States Pictures to take the risk of borrowing money.

In answer to this question, Warner Bros. Pictures is a vast organization, with the exchanges throughout the world, with the hundreds of theatres that we own, and we were in constant need of product. We had to keep obtaining product to release and to justify our overhead. [1353]

In the case of Warner Bros. Pictures the advancement of money to produce pictures is our regular business, where, to a small independent unit, borrowing of money is quite a risk.

The Court: As you viewed it, then, I take it, the corporation had no choice, but United States Pictures did have a choice with respect to the risk of financing?

The Witness: Yes; our business was financing pictures, whereas with United States Pictures, I don't know whether they had a choice. They had a contract with us. We might have been able to force them to make the pictures, but due to certain circumstances and the falling receipts in our theatres, I, for one, felt that it would be more advantageous

(Testimony of Samuel Schneider.)

to our company to have United States Pictures continue to produce pictures even though we would put up most of the money, providing we could arrange the terms, which we did, and which I think are as favorable or more favorable to our company.

Q. (By Mr. Williams): It is a fact, is it not, that Warner Bros., if it was going to stay in business, had to continue to have pictures?

A. Yes.

Q. Whether they got them by making them themselves or having independent producers make them, they had to have pictures in order to supply their exchanges and theatres? [1354] A. Yes.

\* \* \* \* \* [1355]

### Cross Examination

\* \* \* \* \* [1357]

Q. (By Mr. Levy): Do you remember when for the first time you discussed Exhibit 4 or the terms of Exhibit 4?

A. Prior to the signing of this contract.

Q. Prior to December 6, 1947? A. Yes.

\* \* \* \* \*

Q. Do you know when it was signed?

A. No, I don't.

Q. It is dated December 6, 1947. We have had an instance in this case of the contract having been signed much later than it was dated, and therefore I ask do you know when this contract was signed, of your own knowledge? A. No, I don't.

\* \* \* \* \*



(Testimony of Samuel Schneider.)

Q. Do you know where, what part of the country you were in on December 6, 1947 or about that time? A. No, I don't. \* \* \* \* \* [1359]

Q. Now, Mr. Schneider, leaving that aside for the moment, do you know when My Girl Tisa was released first?

A. I think it was around March of 1948.

Q. You are referring to the first general release in the United States of the picture My Girl Tisa?

A. Yes. \* \* \* \* \* [1363]

Q. And you know, do you not, that this picture was exhibited to the Army and to the Navy before it went into general release?

A. I don't know; but pictures are generally given to the Army and the Navy.

Q. No, no. I am talking about this picture.

The Court: What is "this picture"?

Mr. Levy: My Girl Tisa.

The Witness: I couldn't tell you positively about a picture from memory, but I do know that our pictures are given to the Army and Navy just prior to the release date. It might be, also, at the most, a few weeks.

Q. A few weeks before the release?

A. Yes. \* \* \* \* \* [1365]

Q. Do you have anybody present for the purpose of getting an audience reaction to the picture when you release it to the Army and Navy?

A. Yes; the soldiers and sailors.

\* \* \* \* \* [1366]

Q. Warner Bros. keeps a record, does it, of the

(Testimony of Samuel Schneider.)

dates when it receives the completed negative for distribution?      A. Oh, yes.

Q. Where is that record located, to your knowledge?

A. I think in the studios here we would have a record as to when the picture was completed, and when it was started.

Q. No, no; I am not asking——

A. And when it was delivered.

Q. Ah, that is what I am talking about, when it was delivered to Warner Bros.

A. To our laboratory, yes. \* \* \* \* \* [1369]

Q. That date is contained in a book somewhere?

A. Yes.

Q. In the studios?

A. They have the record. \* \* \* \* \* [1373]

Mr. Williams: I have in my own record here the national release date was February 7, 1948.

The Court: The delivery from the producer to the distributor would antedate that?

Mr. Williams: Yes, it would antedate that.

\* \* \* \* \* [1374]

The Court: Perhaps you could tell us the importance of it. We are spending a great deal of time on it. \* \* \* \* \*

The Court: You don't need to go into details. Is it for impeachment purposes, or does it affect some of the contemporaneous transactions, or does it have a bearing on subsequent transactions?

Mr. Levy: Yes; the plaintiff sees in this the

(Testimony of Samuel Schneider.)

probability that in this factual situation, namely, at the time Exhibit 4 was executed——

The Court: On what date?

Mr. Levy: It bears the date December 6, 1947. Warner Bros. and United States Pictures were aware, or had sufficient information to apprehend that My Girl Tisa was going to be a loser and not a winner, and that the additional-pictures contract was made facing that probability; and, if that is so, it would have a bearing [1376] on the bona fides of the parties with respect to the making of this additional-pictures contract, namely, Exhibit 4, and it would have an increased and it would have an additional and it would have a progressive bearing on the subsequent amendments to the contract.

The Court: This Exhibit 4 was subsequently ratified by the Board, was it not?

Mr. Levy: Yes, it was ratified by the Board some two and a half years later.

The Court: What about the minutes of United States Pictures? What do they show?

Mr. Levy: As to what?

The Court: The date of execution, or the date of authorization? \* \* \* \* \* [1377]

Mr. Schwab: No, I do not believe that they were any board meetings being held with relation to the execution of any of the agreements with stars at the studio or anybody else.

Mr. Levy: We cannot have resort to the minute book of United States Pictures as a possible source of information as to when actually a contract which

(Testimony of Samuel Schneider.)

purports to be dated December 6, 1947 was in fact actually executed. \* \* \* \* \* [1378]

The Court: While we are talking about it couldn't you, Mr. Williams, call up the studio, or some of these people here call up the studio——

Mr. Williams: I think we could.

The Court: ——and get the record down here while we are spending all this time?

Mr. Williams: I think we could, your Honor. I think we could ascertain that. \* \* \* \* \*

Mr. Williams: Yes. Of course, my point is that it is utterly immaterial when the print is delivered to the laboratory.

The Court: One of the circumstances, relevant circumstances, [1379] under the plaintiff's theory.  
\* \* \* \* \* [1380]

The Court: I want to be certain that I understand you. At the time Exhibit 7 was executed, it is your testimony that the corporation, Warner Bros., knew that a loss in a substantial sum, something like half a million dollars, would [1381] probably result from *My Girl Tisa*?

The Witness: Yes, on that picture by itself, not figuring any moneys that we might recoup from the profits of other pictures. Oh, yes.

\* \* \* \* \* [1382]

Q. (By Mr. Levy): So that you would say under those circumstances, having the figures in mind that you have just testified to, that on August 31st, 1948 Warner was in a position to apprehend, was it not, that the chances of the recovering of eight



(Testimony of Samuel Schneider.)

hundred and some odd thousand dollars that it advanced, or the production cost of *My Girl Tisa*, were very, very slim indeed, if any chance did exist? Would you say that?

A. Out of the picture *My Girl Tisa* we were——

Q. That is what I am referring to.

A. ——we were positive that we would not recoup the cost of the picture, even on August 31, 1948.

Q. Right. For the reason, among other things, that the bank got the first money, did it not?

A. Yes; and also because we knew of the business that the picture was doing. [1388]

\* \* \* \* \*

Q. Mr. Schneider, on August 17, 1950, when Exhibit 7 in evidence, which is the second amendment to the basic contract involving the additional pictures, was approved, were you aware of the fact that the effect thereof would be to postpone the obligation upon the part of United States Pictures to pay to Warner Bros. any deficiency resulting from the loss on *My Girl Tisa* to approximately January of 1947?

A. I was aware that there would be a postponement of the obligation to pay from the release date of the last of the six pictures, whenever released, four years after that, whatever the date would be.

Q. That would bring it down, according to my calculation, to approximately January, 1957.

A. If the last of the six pictures was released four years prior to that.

(Testimony of Samuel Schneider.)

Q. That is right. A. Yes.

Q. You participated, did you not—and if you did not, please say so—in the postponement that was granted to United States Pictures by the terms of the August 12, 1952, contract? It is in evidence here as Schedule H attached to Exhibit 107.

A. Yes.

Q. You were aware then, were you not, that the [1400] postponement that we spoke about previously would have the effect of postponing the United States Pictures' obligation as a fixed obligation to pay Warner Bros. any deficiency resulting from the loss on *My Girl Tisa* to approximately January, 1959?

A. The same answer prevails.

Q. Yes.

A. That there would be a postponement.

Q. Yes.

A. Whatever the deficiency might be.

Q. I ask you this question: Were you aware of the fact that by the terms of paragraph 5 of Exhibit 4 in evidence, namely, the December 6, 1947, amendment, the agreement between United States Pictures and Warner Bros. was to the following effect: Warner Bros. said to United States Pictures:

“You agree that prior to the commencement of the principal photography of any of the photoplays hereinbefore referred to and about to be produced

(Testimony of Samuel Schneider.)

same shall be a remaining photoplay or an additional photoplay as hereinbefore referred to"?

You were aware of that clause in that contract?

A. Yes.

Q. Did that clause mean anything to you from the [1401] point of view of Warner Bros.?

A. Yes.

Q. Were you aware of the fact that under and by virtue of the provisions of that clause, United States Pictures could call upon Warner Bros. to advance 100 per cent of the cost of preparation of any picture that it was engaged in producing—and when I say preparation, I mean from the acquisition of the story, its treatment, its conversion into a screen play, any expense involved in the pre-production of any picture—Warner Bros. would have to advance 100 per cent of all of the cost of that up to the point at which United would walk onto the sound stages and begin turning the cameras? Were you aware that was the situation?

A. It actually doesn't work that way, that they wait until they are on the stage to turn the cameras, but in substance I was aware of the fact that Warner Bros. Pictures could be called upon to advance whatever money was necessary to obtain a story, prepare the story and write a screen play, pre-production expenses, up to the point they would designate whether the picture would be an original or additional picture.

The Court: Whether what?

The Witness: Whether at the time United States

(Testimony of Samuel Schneider.)

Pictures would advise us as to whether or not they choose [1402] to go to the bank and borrow half the money and produce the picture under the terms of the original agreement. I was aware of that.

Q. (By Mr. Levy): Did you consider that of considerable advantage to United States Pictures?

A. No.

Q. You did not?

A. No. I did not consider it of any advantage to the United States Pictures, the fact that they could wait a certain time before they decided under which basis they want to produce the picture.

Q. You did not think it was to the advantage of United States Pictures to have Warner foot the bills in order to get the package, so to speak, in shape before they begin turning the cameras?

A. I don't think that was an advantage.

Q. How long have you been in the motion picture business, Mr. Schneider?

A. 30 years with Warner Bros.

Q. You have spoken to a good many independent producers during your time? A. Many.

Q. You know, do you not, that it is one of the important factors that enter into independent production of a motion picture to have the money that is involved in the [1403] pre-production of the picture, do you? A. Yes.

Q. That is an important element in independent motion picture production, isn't it? A. Yes.

Q. If you haven't got the money with which to prepare a picture up to the point at which you



(Testimony of Samuel Schneider.)

begin turning the cameras on it, you might as well not be in the business; isn't that so?

A. I can't imagine how you could prepare a picture without having any money. [1404]

\* \* \* \* \*

Q. Who suggested that paragraph be inserted in the contract? Did you?

A. What paragraph is this?

Q. Paragraph 5 that I just read to you.

The Court: Paragraph 5 of what exhibit?

Mr. Levy: Paragraph 5 of Exhibit 4.

The Witness: No, I didn't suggest that paragraph.

Q. Do you know who did suggest it?

A. No, I don't. [1407]

\* \* \* \* \*

Q. Did you see any advantage to Warner Bros. in giving United States Pictures the option of declaring a picture to be an original picture instead of an additional picture? A. No.

\* \* \* \* \*

Q. You didn't? I call your attention to paragraph 10 of the agreement.

Mr. Williams: Still referring to Exhibit 4?

Mr. Levy: Still referring to Exhibit 4. [1408]

\* \* \* \* \*

Q. (By Mr. Levy): Are you aware of the fact that United States Pictures was receiving a decided advantage under the terms of that paragraph? A. No.

Q. Sir?

(Testimony of Samuel Schneider.)

A. No, I wasn't aware that they were receiving a decided advantage.

As I explained before, the whole spirit of the deal was that it was a joint venture, so that whatever we could make available or finance for United States Pictures to enable them to make motion pictures suitable for distribution would be advantageous to Warner Bros. Pictures. [1409]

\* \* \* \* \*

Q. Were you aware of the fact that under the basic agreement, under the basic contract, United States Pictures had the right to make outside photoplays, that is [1412] to say, outside pictures, pictures in which Warner Bros. would have no interest, financial or otherwise?

A. I knew that the contract provided that.

\* \* \* \* \* [1413]

Q. Did you ever receive a final and fully itemized statement of the production cost of the picture Cloak and Dagger? A. Yes.

Q. Did you observe on that final and fully itemized statement that United States Pictures had allocated approximately \$116,000, let us say over \$100,000, as United States Pictures' overhead with respect to that picture?

A. I don't recall the amount, but I did see a final statement, if that is the amount,——

\* \* \* \* \*

A. ——if that is the amount of that statement, then that is what I saw. [1419]

\* \* \* \* \*

(Testimony of Samuel Schneider.)

Q. Did the thought occur to you that the figure \$116,000 was rather high?

A. Well, now, let me think a moment. I think the picture cost about \$1,800,000, if I recollect. So that the direct cost of that picture would be about \$1,300,000, a million three hundred to a million four hundred thousand. [1420] So that \$116,000 would be about less than 10 per cent.

Q. You thought that was reasonable, didn't you?

A. Well, it is not a question of whether I thought it was reasonable. I knew that in order to run United States Pictures they would have certain expenses.

\* \* \* \* \*

Q. Expenses sufficient to involve them in a cost of \$116,000 as against one picture as overhead?

A. Well, of course, if he would have produced two pictures in that time that he produced one picture, the overhead would have been 50 per cent of that amount on each picture. As it happened, whatever the circumstances were, he made this one picture, and it is just as difficult to make one picture costing \$1,800,000 as it is to make two pictures costing \$800,000 apiece. There is a lot of things and there is a lot of longer production schedule.

Q. We are talking of overhead, Mr. Schneider.

A. Yes. I say it took United States Pictures a longer time to make this one picture, so that there was a larger amount of overhead charged to a picture, just the same as Warner Bros. Pictures charged a greater amount of overhead to that pic-

(Testimony of Samuel Schneider.)

ture than they would have charged if the picture cost half as much.

Q. Did you at any time know, Mr. Schneider, that United [1421] States Pictures produced two pictures in the year 1946; No. 1, Cloak and Dagger, to which it allocated as overhead \$116,000; and Pursued, to which it allocated in that same year \$129,000 as overhead? The total of those two figures that I gave you is obviously \$245,000. Did you ever pause to think that United States Pictures had reported to Warner Bros. and that report came across your desk, that for the year 1946 United States Pictures had an overhead of approximately a quarter of a million dollars, or, let us say, \$230,000-odd.

A. I don't think the overhead for one year was that much. I don't think they produced two pictures in one year, from my recollection.

Q. Don't you?

A. No. I think it took longer than that, just my memory. I would have to actually look at the record.

Q. If I were to tell you that they had, would that mean anything to you?

A. Well, just let me think a moment. I would imagine that Cloak and Dagger and Pursued took more than a year to produce and absorbed more than one year of the United States overhead, from my recollection.

Q. Mr. Schneider, what do you mean by "absorbed"? What do you mean by your last answer "absorbed more than one year's overhead"? [1422]



(Testimony of Samuel Schneider.)

A. In other words, I think that the two pictures, the amount of overhead that United States Pictures charged to those pictures was more than one year of its overhead. I don't think their overhead amounted to that much in one year, just my own——

Q. If they said that that was the overhead for 1946, if United States Pictures stated in writing and that writing came across your desk, namely, United States Pictures' overhead for the year 1946 is \$235,000, would that have caused you any concern as representing the Warner Bros. office?

Mr. Williams: Just a moment. That is purely speculation, if your Honor please, and objected to on that ground.

The Court: Overruled. He may answer.

A. If I was advised at that time that the United States Pictures' overhead for the entire year of 1946 was \$230,000-some odd, as you stated, I would think it was high, but would also imagine that there are many charges and expenditures in that year which might apply to subsequent productions, such as may be the purchase of scripts or stories.

Q. (By Mr. Levy): Did you at any time prior to December 6, 1947, did you at any time prior to that time know that United States Pictures had included in its overhead for the year 1946 over \$50,000 representing the cost of literary properties that United States Pictures had purchased up to

(Testimony of Samuel Schneider.)

[1423] the end of the year 1946, had not used, but had abandoned them? Did you know that?

A. No. I didn't know that exact fact, although I knew that they were buying literary properties and I wouldn't—during 1947 I wouldn't imagine that they abandoned all the properties that they had purchased, even though they might have written them off.

Q. So you did not know then, Mr. Schneider, that United States Pictures actually abandoned stories during 1946, wrote them off, and included in the overhead for the year 1946 the 50-odd thousand dollars which represented those write-offs? You did not know that?

A. How do you get the knowledge that they abandoned them?

Mr. Levy: They admit it.

Mr. Williams: Now, just a moment, if your Honor pleases. I object to that statement. The witness answered, based on a question, your Honor. I object as not——

The Witness: Warner Bros.——

The Court: Is the fact not in evidence?

Mr. Williams: Not that fact.

The Witness: When Warner—can I state?

The Court: The question is improper if it is not based on facts in evidence.

Mr. Levy: If it is not based on facts in evidence, your [1424] Honor, I shall withdraw the question and I shall apologize humbly.

The Witness: Might I finish my answer there?

(Testimony of Samuel Schneider.)

The Court: Does the defense contend that it is predicated upon facts not in evidence?

Mr. Williams: Yes, if your Honor please.

The Court: What facts?

Mr. Williams: The fact that there was a \$50,000 writeoff in the year 1946 for abandoned stories.

The Court: Mr. Levy, this can go on endlessly. The executives of Warner Bros. are charged with knowledge of whatever the facts were. And what purpose does it serve to go over it with this witness?

Mr. Levy: May I state the purpose?

The Court: Is it to give him a memory test on it?

Mr. Levy: My purpose——

The Court: If you want to ask him hypothetically if he had known the facts were such and such, would he have acted differently, I think that might get us somewhere. But just merely to ask him, time after time, if he knows these things is just a memory test, as I view it.

Mr. Levy: May I state my purpose, your Honor? I really have a purpose, and the purpose is this: To show that this witness was controlled by Harry Warner, to show that he was a "yes" man for Harry Warner. [1425]

The Court: How does conducting a memory test show whether he was? All these things are purely relative. You can say in a treble tone "There is \$250,000," but that may be nothing. It may be exorbitant, it may be outrageous, but it is all rela-

(Testimony of Samuel Schneider.)

tive. Unless it is related to something else, standing alone it means nothing to me.

Mr. Levy: Very well, your Honor.

Q. Mr. Schneider, may I ask you this question: Do you know of any other producer with whom Warner has made an independent motion picture production-distribution agreement who allocated as much as \$204,000 as overhead to a particular picture?

A. I don't think we had a contract of this kind with any other producer.

Q. I asked you this question: Do you know of any case in which Warner Bros. entered into a contract with any independent producer in which the independent producer was permitted to charge, to allocate to a picture as much as \$204,000 as overhead?

Mr. Williams: Now, just a moment, if your Honor please. That assumes that there were other contracts under which independent producers allocated overhead. Counsel well knows, and he has examined the contracts, the other contracts do not provide any such thing, and consequently that question means nothing. [1426]

The Court: Do you mean a single picture?

Mr. Levy: A single picture.

The Court: Overruled. You may answer. Do you know?

A. We have no other contract with a producer, with an independent producer of this type which permits what you just asked.



(Testimony of Samuel Schneider.)

The Court: The answer is "no"?

The Witness: No. [1427]

\* \* \* \* \*

Mr. Williams: May Mr. Schneider be excused from further attendance?

The Court: Is there any occasion to require him to remain here?

Mr. Levy: I am just wondering, your Honor. The reason why I say there might be some occasion is this: We are trying, as I understood, limited issues here now, and this applies to both this witness and the witness Mr. Friedman who preceded him. They are New York people and [1429] I readily realize that they want to get back as quickly as possible. But we are trying limited issues here.

The Court: Mr. Levy, you may need them tomorrow. We will ask them to remain until tomorrow. I hope that we can reach a conclusion of the evidence tomorrow on this matter.

Mr. Levy: On the issues that we are trying now, your Honor?

The Court: On the two issues, yes; on the issue as to jurisdiction and as to laches or limitation.

\* \* \* \* \* [1430]

DEPOSITION OF MILTON SPERLING

a defendant in the above-entitled action, taken on behalf of the plaintiff, at 1:30 o'clock p.m. on Wednesday, November 22, 1950, at 4000 West Olive Avenue, Burbank, California, before William H. Burgess, Jr., a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed stipulation. [1440]

\* \* \* \* \*

By Mr. Lyon:

Q. Do you know of any expenses that United States Pictures has which it does not put in as an overhead [1478] expense and charge to pictures produced, to date?

A. All so-called direct costs appear on the budgets as direct costs.

Q. I mean other than direct costs.

A. I do not know of any. [1479]

\* \* \* \* \*

HERBERT FRESTON—(Recalled)

Cross Examination

\* \* \* \* \*

Mr. Levy: At this time, your Honor, I offer Exhibits G, H and I that are marked for identification into evidence.

The Court: Is there objection?

Mr. Williams: No, your Honor. [1487]

The Court: Received in evidence.

(Testimony of Morton Barnard Blumenstock.)

Q. What department?

A. Advertising and publicity. [1494]

Q. How long have you been in charge of that department, or those departments?

A. About 15 years.

Q. Prior to that did you work in advertising and publicity for Warner Bros.? A. I did.

Q. How many years all together have you been connected with Warner Bros.?

A. About 28.

Q. In 1945 where was your office?

A. New York.

Q. At that time you had charge of advertising and publicity for Warner Bros.?

A. That is right.

Q. Are you familiar with the fact that about the 28th of September, 1945, an agreement was made between United States Pictures and Warner Bros. for the production by United States Pictures and the distribution by Warner Bros. of certain motion pictures?

A. I was familiar at that time with such a deal.

Q. Did you at that time arrange for publicity to be given to that matter?

A. I did.

Q. Did any person or persons request or suggest that you arrange for such publicity? [1495]

A. I believe Mr. Warner acquainted me with the details of the arrangement which he wanted to announce, our publicity and advertising.

Q. Which Mr. Warner?

(Testimony of Morton Barnard Blumenstock.)

A. Mr. J. L. Warner.

Q. Did you at that time arrange for the placing of advertising in a certain number of trade journals? A. Yes.

Mr. Williams: I would ask the clerk to place before the witness Exhibits D and E for identification.

Q. I ask you, Mr. Blumenstock, to refer first to Exhibit D for identification, and particularly to the back part of that, and I ask you whether you recognize the advertising which appears on the back of that exhibit as advertising which was placed under your direction in the Daily Variety.

A. That is correct.

Q. I will ask you to examine Exhibit E for identification and state whether you recognize the advertisement which appears upon the back of that exhibit as an advertisement which you caused to be placed in the Hollywood Reporter.

A. Yes; they are identical and they appeared in both papers.

Q. Did you have identical ads put in other papers? [1496] A. Yes.

Q. Did those appear on or about the dates that the ads appeared in the Daily Variety, Exhibit D, and the Hollywood Reporter, Exhibit E, both for identification?

A. On or about. I believe they were subsequent to the appearance——

Q. Do you remember their having been in a number of other papers?



(Testimony of Morton Barnard Blumenstock.)

A. I remember that they were, more accurately. I had my office give me a schedule of appearances at that time.

Q. Will you state in what other publications this same ad appeared, and the dates when it appeared?

A. These advertisements appeared, the identical advertisement appeared in *Film Daily*, a New York publication, on October 2nd.

Mr. Levy: Just a moment. I move to strike the answer of the witness on the ground it is not the best evidence, in the first place.

I rest on the objection on that ground.

Mr. Williams: We think it is proper, if your Honor please, in view of the fact that the format and character of the ad has been shown, and that this witness knows that it was placed in the paper.

The Court: Does it appear in this record that the [1497] witness subsequently saw these publications?

Mr. Williams: I will ask that question.

Q. Did you see the publications, the ad as it appeared in the various papers in which it was then placed?

A. You mean at the time of the publication?

Q. Yes. A. That is part of my job.

Q. You did see them?

A. I would have to.

Q. You did? A. Yes.

Q. All right.

(Testimony of Morton Barnard Blumenstock.)

The Court: The motion is denied. The objection is overruled.

Mr. Reporter, was there an answer to the question to which Mr. Levy made an objection?

(The record was read, as follows:

“Q. Will you state in what other publications this same ad appeared and the dates when it appeared?

“A. These advertisements appeared, the identical advertisement appeared in Film Daily, a New York publication, on October 2nd.”)

Mr. Levy: And it was that answer that I made a motion to strike.

Q. (By Mr. Williams): What year; 1945?

A. 1945.

Mr. Levy: And now I move to strike the answer again, if your Honor please, on the grounds that the testimony is incompetent, irrelevant, and immaterial, and has no bearing on the issues that are now being tried.

The Court: Do you expect to offer Exhibits D and E in evidence?

Mr. Williams: I will at this time offer Exhibits D and E in evidence, if your Honor please.

The Court: Is there any objection?

Mr. Levy: No objection to these exhibits.

The Court: Exhibits D and E for identification are now received in evidence. May I see them, Mr. Clerk?

(Defendants' Exhibits D and E for identification were thereupon received in evidence.)

(Testimony of Morton Barnard Blumenstock.)

The Court: You are not addressing your objection to the offer of these exhibits?

Mr. Levy: Not these two, no.

The Court: You are addressing your objection to the pending question?

Mr. Levy: I am referring to the pending question, that is, the question directed to the witness about advertisements made in other publications which are not here present.

The Court: I believe the present state of the record [1499] is that the answers were given and you made a motion to strike on that ground?

Mr. Levy: Yes; I make a motion to strike the answer.

The Court: The motion is denied. The objection is overruled.

\* \* \* \* \*

A. The other publications in which this advertisement appeared were Weekly Variety, October 3rd issue, 1945. That is a New York publication. Motion Picture Daily, another publication, the same advertisement appeared October [1500] 4, 1945. Box Office, a Kansas City publication, the same advertisement appeared October 6, 1945. Exhibitor, a Philadelphia publication, the same advertisement appeared October 10, 1945. Motion Picture Herald, a weekly New York publication, the same advertisement appeared October 13, 1945. Showman's Trade Review, an eastern publication published in New York City, the same advertisement appeared October 13, 1945.

(Testimony of Morton Barnard Blumenstock.)

Q. The Daily Variety and the Hollywood Reporter, which have been received in evidence as Exhibits D and E, are both California publications?

A. Los Angeles publications, yes. [1501]

\* \* \* \* \*

SAMUEL SCHNEIDER

recalled to the stand on behalf of defendants, previously sworn, testified further as follows:

Cross Examination—(Resumed)

Q. (By Mr. Levy): Mr. Schneider, I omitted to ask you, prior to December 6, 1947, the date of Exhibit 4 in evidence, were you aware of the fact that Mr. Harry Warner had personally guaranteed an obligation from United States Pictures to the New York Trust Company in the sum of \$150,000, evidenced by a demand note in that sum, dated March 3, 1947?      A. Yes.

Q. You were, of course, aware of that fact, were you not, on August 17, 1950, and you were also aware of that fact on August 12, 1952?

A. Yes.

Q. On or about the dates that I have called your attention to, were you aware of the fact that 62 shares of the capital stock of United States Pictures was held in [1585] trust by the Title Insurance and Trust Company of Los Angeles for the benefit of Mr. Sperling's minor children?

A. I cannot say that I was aware of that fact on those dates.



(Testimony of Samuel Schneider.)

Q. Did you before December 6, 1947, know that 62 shares, or some shares of United States Pictures were being held in trust by the company whose name I have just mentioned, for the benefit of Mr. Sperling's minor children?

A. I was not too familiar with that at any time, and I cannot say that I did not know it, because in conversations with Milton Sperling he mentioned something about that, which was not too significant to me.

Q. Were you aware of the fact that Mr. Bernhard severed his relationship with United States Pictures on or about September 18, 1946?

A. Yes.

Q. Were you also aware of the fact that when he so severed his relationship with United States Pictures he sold his interest in United States Pictures, his stock interest, namely, 125 shares of the capital stock of United States Pictures, to Milton Sperling for the sum of \$400,000 in cash?

A. Yes.

Q. Were you also aware of the fact that in order to pay Mr. Bernhard the purchase price of those shares of [1586] stock, Mr. Sperling had borrowed that sum, namely, \$400,000, from the New York Trust Company?

A. I knew that he was arranging for a loan at the New York Trust Company.

Q. Were you aware of the fact that in order to obtain that loan it became necessary for Mrs. Betty Sperling to pledge collateral owned by her, namely,

(Testimony of Samuel Schneider.)

a share in Warner Pictures Corporation stock, to the New York Trust Company?

A. I was generally familiar with those facts.

\* \* \* \* \* [1587]

The Court: Do both sides rest on the issues as to jurisdiction, laches, or limitation?

Mr. Williams: Yes, your Honor.

Mr. Levy: Yes, your Honor. \* \* \* \* \* [1625]

The Court: If we take up the case further on the merits, it would be sometime in July, the last half of July, or in the fall. \* \* \* \* \* [1629]

### JOSEPH CHARLES YOSS

recalled as a witness on behalf of defendants, previously sworn, testified further as follows:

\* \* \* \* \*

#### Cross Examination

Q. (By Mr. Levy): Mr. Yoss, you are a vice president of the defendant United States Pictures?

A. Yes.

Q. You are the accountant for United States Pictures? A. Yes. \* \* \* \* \* [1775]

#### Recross Examination

The Court: What are you seeking to show?

Mr. Levy: I am seeking to show how much United States Pictures was entitled to receive according to the defendants' theory from all of these additional pictures which they say they have retained to diminish the loss.

The Court: Why don't you ask this witness for

(Testimony of Joseph Charles Yoss.)

the figures, and the conclusion to be placed on the figures is another matter? If you want to ask him what 20 per cent of the net profit was, you may, or however you may wish to [1794] phrase it.

Mr. Levy: Yes, your Honor.

Q. What is the 20 per cent of the net profit on the picture South of St. Louis up to November 29, 1952, Mr. Yoss?

A. Mr. Levy, I don't know what net profits on this picture, or whose net profits on this picture you are referring to.

Q. United States Pictures, Mr. Yoss.

A. Then I must tell you that we have had no net profits yet on this picture.

The Court: Mr. Yoss, do you know what he is asking you? He is asking you what figures represent 20 per cent, whether you have ever received it or not. Don't be captious about it.

The Witness: The answer is \$30,498.18.

Q. (By Mr. Levy): What about Three Secrets, how much?

The Court: Are there several of these you are going into?

Mr. Levy: I think there is one more on which there has been a profit.

The Witness: Calculated on the same basis as the prior answer, except as to date, that would be to November 29, 1952, the answer would be \$34,682.97.

Q. Can you do the same with The Enforcer?

A. The answer on The Enforcer to November

(Testimony of Joseph Charles Yoss.)

29, 1952 [1795] on the same basis, would be \$32,-451.18.

Q. Is there any other picture beyond The Enforcer of the balance that are in the same class, namely, that have resulted in an excess of gross receipts over the total cost of production and distribution? A. No.

Q. These are the only three pictures, is that correct, in which there has been an excess of gross receipts over and above the grand total of production, distribution allowance, and expenses?

A. Produced subsequent to Tisa, of course, excluding Cloak and Dagger and Pursued.

Q. Yes, excluding those. I am talking of additional pictures.

A. That is right.

Q. The pictures that followed The Enforcer were which? A. Distant Drums and Retreat, Hell.

Q. Distant Drums and Retreat, Hell?

A. Distant Drums and Retreat, Hell.

Q. These two pictures have not yet recouped their cost?

Mr. Williams: We are talking as of what date?

Mr. Levy: November 29, 1952.

The Witness: There is a small balance as of November [1796] 29, 1952.

Q. In whose favor?

A. Of costs yet to recoup.

Q. Of costs yet to recoup? A. Yes.

Q. The total of the figures that you have just calculated is what? A. \$97,632.33.



Mr. Levy: I have no further questions. I have no objection to the introduction of this exhibit in evidence. \* \* \* \* \*

The Court: Is there any further evidence to be offered on the issues as to jurisdiction, limitation, or laches?

Mr. Levy: May it please the court, I have been thinking over very carefully some of the questions your Honor propounded to me yesterday in our discussion with respect to the meaning of hostility, antagonism, etc., etc. I was wondering whether a cross examination of the [1797] principal characters in this drama would shed any light on that particular subject.

In the present state of the record, your Honor has before you the depositions of Harry Warner, Jack Warner, Milton Sperling, and Joseph Bernhard, these being the gentlemen who originally entered into these arrangements, planned this from the very start, and participated in the bringing into being all of the transactions that are at issue in this case.

I have not cross examined any one of these people. It may be that a cross examination of them will yield further light on the question, namely, is there hostility, is there antagonism between the corporation as composed of the individuals who influence its day-to-day conduct and are responsible for its basic policy, are responsible for not only its executive decisions in the making of contracts, but are responsible for the attitude that the corporation

will take when questioned by a stockholder, or when challenged by a stockholder that their behavior was or was not according to the stockholder's conception of what was right under the circumstances.

The Court: I should assume, unless there is some contention expressly made to the contrary, that this corporation would never have brought this suit. Is there any contention to the contrary?

Mr. Levy: That what, your Honor?

Mr. Williams: We don't make such contention.

The Court: That if the stockholder had made demand on the directors and waited any period of time, the suit would never have been brought by the corporation.

Mr. Williams: No, certainly not.

The Court: So far as demand and refusal are concerned, I take it, the defendant, in effect, stipulates that a demand would have been futile.

Mr. Williams: But not for the reasons alleged in the complaint.

The Court: No; but for the reasons contended by the defendant.

Mr. Williams: Certainly not for the reason that the defendants ever contended the contract was fraudulent.

Mr. Levy: I have no further evidence to offer, under those circumstances.

The Court: As I understand the defendants' position, and I can be corrected if I am in error, the defendants' position is that this was an advantageous arrangement to the Warner corporation, and the directors would have upheld it at any time

against any attack by any person, including any group of stockholders.

Mr. Levy: That is the position of both the individual defendants Warner brothers and the corporation— [1799] all of them contend likewise.

Mr. Williams: The individual defendants Warner brothers are not involved in that issue. It is the corporation that is involved in that issue.

The Court: And, for those reasons, no matter what demand the plaintiff stockholder had made on the directors, they would never have brought this suit. Is that a fair statement of it?

Mr. Williams: Yes, that is a fair statement, but not for the reasons alleged in the complaint, that there was domination; but for the reason that in the opinion of the responsible officers and directors of the corporation this was a good contract.

The Court: By “good”, you mean advantageous to the corporation?

Mr. Williams: Advantageous to the Warner corporation, yes.

The Court: If you have closed the evidence, we will proceed with the arguments at two o’clock.

\* \* \* \* \* [1800]

Mr. Williams: I move for a judgment of dismissal in favor of the defendants in this case, first on the ground that the court has no jurisdiction of the action, and, second, a judgment in favor of the defendants on the ground that the action was brought more than three years after the acts complained of, and is barred by the provisions of the statute of limitations of the State of California and

the statute of limitations of the State of Delaware, each of them being substantially a three-year statute. I simply make those motions formally at this time in preparation for the argument.

The Court: I construe those motions, unless there is objection, to be motions for all of the defendants.

Mr. Williams: All of the defendants, yes.

The Court: First, to dismiss the action for want of jurisdiction over the subject matter, because of laches and diversity of citizenship?

Mr. Williams: Yes, your Honor.

The Court: And, secondly, to dismiss the action on the ground that the charges brought are barred by limitations or laches, as the case may be, or by both limitations and laches, which would be the proper motion, I take it.

Mr. Williams: Yes. \* \* \* \* \* [1801]

Mr. Levy: May it please the court, your Honor will recall, and Mr. Williams, that I requested the record of the film negative, completed negative, of My Girl Tisa from United States Pictures to Warner Bros. Pictures. You asked Mr. Williams whether that date could not be gotten over the telephone prior to the bringing of the record into this court. We had forgotten all about that. I spoke to Mr. Williams about it this morning and asked him to please produce that record so that it can be made part of the evidence in this case.

The Court: Could someone get that this morning?

Mr. Williams: I can get it today. The record is in [1909] New York, and it is a negative which



was mailed in New York to the laboratory. The laboratory records show the date it was received, November 21, 1947. That I got by telephone, but there was never anything said to me about getting any record.

The Court: No, just the date, as I understood it, without the necessity of bringing the record.

\* \* \* \* \* [1910]

Mr. Kelly: Now, your Honor, equity is not a one-way street. Usually we have a complainant of this kind asserting acts of fraud. Unfortunately in these suits we have a corporation that is subject to tremendous expense that they can be put to in defending a suit of this kind.

We beg the court, as a court of equity, to consider the equities of the defendants, both the individual directors and the company. We have a perfect example here of—

The Court: The company is not defending the suit, in a sense, is it?

Mr. Kelly: Sir?

The Court: Is the corporation here defending?

Mr. Kelly: It is aligned as the defendant, your Honor. I am pointing out to the court that presumably under the cloak of equity this plaintiff is seeking to do something for the corporation.

\* \* \* \* \* [1973]

[Endorsed]: Filed April 26, 1954.

[Endorsed]: No. 14334. United States Court of Appeals for the Ninth Circuit. Charles B. Smith, as Special Administrator of the Estate of Edward S. Birn, deceased, Appellant, vs. Milton Sperling, Harry M. Warner, Jack L. Warner, United States Pictures, Inc., and Warner Bros. Pictures, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 28, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14334

CHARLES B. SMITH, as Special Administrator  
of the Estate of Edward S. Birn, Deceased,  
Appellant,

vs.

MILTON SPERLING, HARRY M. WARNER,  
JACK L. WARNER, UNITED STATES  
PICTURES, INC., and WARNER BROS.  
PICTURES, INC., Appellees.

STATEMENT OF POINTS ON APPEAL AND  
ASSIGNMENT OF ERRORS

The following are Appellants' points in seeking  
a reversal of the judgment dismissing the suit upon

the ground that the Court had no jurisdiction of the subject-matter. (Respondent Warner Bros. Picture Corporation is hereinafter referred to as "Warner" and respondent United States Pictures, Inc. is hereinafter referred to as "United".)

## I.

It was error for the District Court to align Respondent Warner alongside Appellant because these parties are admittedly on opposite sides of a controversy in which the real matter in dispute is: Whether Warner has been dealt with unlawfully and unfairly, in a joint venture in motion picture production-distribution that was admittedly organized by Respondents Warner and United in 1945 and has been conducted by them ever since.

## II.

Facts which are not in dispute disclose the presence of a justiciable controversy between Appellant and Respondent Warner, as a matter of law.

## III.

The record discloses certain material facts, each of which is not in dispute and properly the subject of a finding. The learned District Court erroneously omitted to find these facts to be true and to include them in its findings. Considered in the light of these omitted facts, the District Court's findings are rendered insufficient to support the conclusion, to wit: That for jurisdictional purposes, Respond-

ent Warner should be realigned and placed along side the Plaintiff Stockholder.

#### IV.

The contract between Warner and United (referred to in the findings as "The Contract in Controversy") is illegal. Equally illegal is the series of amendments and supplements thereto which were—admittedly—executed and acted upon by the Corporate Respondents.

#### V.

The seventy-eight thousand (\$78,000.00) dollar payment by Warner to Joseph Bernhard is illegal.

#### VI.

Facts which are not in dispute establish as a matter of law that Warner was in hands antagonistic to its financial interests and those of its stockholders. The District Court erred in finding or concluding, to wit:

"nor was said corporation at any time herein referred to in hands or under control antagonistic to the financial interests of said corporation and its stockholders."

#### VII.

Directors' admissions exhibit and establish Harry Warner as controlling the composition of the Warner directorate and dominating its membership, as a matter of law. In view of said admissions, the District Court erred in concluding that "Neither the corporation nor its directors or officers were shown



to be at that time or at any time under the domination and control of the three Warner Brothers."

### VIII.

The findings are insufficient as a matter of law, to sustain the conclusion with respect to the first cause of action, to wit: "That Warner Bros. Pictures, Inc. should be realigned as a party plaintiff."

### IX.

The conclusion of law with respect to the second cause of action numbered 1, to wit:—"And therefore the Court finds that United States Pictures, Inc., is a party so necessary and indispensable that a court of equity will not proceed to determination without it; and that without said corporation as a party, the cause of action is without equity." is contrary to law.

MOSS, LYON & DUNN and  
HERMAN H. LEVY,

/s/ By HERMAN H. LEVY

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1954. Paul P. O'Brien,  
Clerk.

At a Stated Term, to wit: The October Term A.D. 1953, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of Los Angeles, in the State of California, on Monday, the second day of August, in the year of our Lord one thousand nine hundred and fifty-four.

Present: Honorable Albert Lee Stephens, Circuit Judge, Presiding; Honorable James Alger Fee, Circuit Judge; Honorable Chase A. Clark, Circuit Judge.

[Title of Cause.]

ORDER SUBMITTING MOTION RE RECORD  
ON APPEAL AND GRANTING MOTION  
IN PART

Ordered motion of appellant to permit appeal to be prosecuted on original exhibits, etc., submitted to the court for consideration and decision on papers filed, pursuant to oral stipulation of Mr. Herman H. Levy, counsel for appellant, and by Mr. Eugene B. Williams, counsel for appellees.

On consideration thereof, It Is Further Ordered that leave be, and hereby is granted to appellant to prosecute the appeal herein on original exhibits, and that reference to the District Court's opinion in the Federal Supplement be permitted instead of reproducing said opinion in the printed transcript, but that the portion of the motion for hearing of cause on typewritten transcript of the evidence be, and hereby is denied.

